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Supreme Court of the United States.

No. 217.

OCTOBER TERM, 1880.

MRS. ELLA F. BONDURANT,
Executrix and tutrix, etc.,
vs.
FRANK WATSON.

Appeal from the U. S. Circuit Court, District of Louisiana.

Assignment of Errors.

Hopkins' Printing Office, 20 and 22 Commercial Place. N. O.

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In the final judgment rendered by the Circuit Court of the United States for the District of Louisiana in the case No. 217, entitled, " Ella F. Bondurant, executrix of W. E. Bondurant, deceased. and tutrix of her minor child, appellant, vs. Frank Watson, appeal from the Circuit Court of the United States for the District of Louisiana, the plaintiff in error assigns the following as errors in the proceedings and judgment of said Court:

1st. whereas the records show that the transcript from the State Court was filed in the Circuit Court of the United States on the first day of November, 1875. Printed transcript of record, page 13. on the law side of the court as a proceeding under the law of Louisiana, Hon. William B. Woods. presiding, and that motion to dissolve the injunction issued by the State Court (see page 16 printed transcript) was filed on the 29th day of same month, and that the answer of Watson, the defendant in error, was filed on the same day, and that the cause was heard on the motion to dissolve (see printed transcript, page 18) and that the case was called for trial November 23rd, 1876, and that the said Hon. E. C. Billings directed that the cause be proceeded with on the equity side of the court as a chancery case, and, whereas, by the law of the State of Louisiana, which was the law of the contract, the plaintiff in execution was entitled to have the cause summarily pronounced upon the plaintiff's judgment being based on a public act, bearing mortgage and privilege as specified by Art. 751. The plaintiff in error assigns as error the said order rendered on the 23rd of November, 1876, as inasmuch as it changed the remedy granted by the law of the contract from summary proceedings to the slow and ordinary course of chancery and thereby causing great delay and damage to defendant.

2nd. This it is shown by the record at p. 60 of printed transcript, that the injunction was dissolved by the order of the court and by the laws of Louisiana. C. P. 304. That the plaintiff in execution became entitled to damages by the dissolution of the injunction in the same judgment to the amount of twenty per cent. upon its dissolution as in said article provided, and, whereas, the Hon. Court rendered a final decree on June 3rd, 1876, wherein he decreed that the said injunctions be reinstated and perpetuated, and plaintiff respectfully alleges that there was error in said judgment in giving effect to the judgment of the Supreme Court of Louisiana rendered in violation of the said act of congress approved May 3rd, 1875.

The plaintiff in this case is the mother and tutrix of her minor child, Walter E. Bondurant, the only child and heir of the late Dr. W. E. Bondurant, in the suit of Watson, plaintiff in error, vs. W. E. Bondurant, defendant in error, reported in the 21st Wallace, 123, in which a full history of this case, up to the time of that decision, will be found.

In that case the Supreme Court of the United States affirmed the decision of the Circuit Court as to the rightfulness of the claim to the tract of land in dispute. but decided that the form of law had not been fulfilled as required by the laws of Louisiana. inasmuch as the sheriff had not taken actual possession of this tract, which was isolated and apart from the plantation, which was sold at the same time. Upon this decision the defendant in the present suit issued an alias writ of seizure and sale, and caused this tract to be re-advertised for sale, when the plaintiff in this suit, Frank Watson, the son of A. C. Watson, Sr., plaintiff in error in said case in 23 Wallace, 123, opposed the execution of the writ in a petitory action, claiming this land as his, in virtue of a purchase by of his father in December, 1875, during the pendency of the suit in the Circuit Court of the United States, alleging the same cause of action that had formed the defence of his father in the former suit (21 Wall. 123), to wit., that the mortgage under which we claim to sell was prescribed and void, having not been reinscribed within ten years from the date of its first inscription, a ground which had been decided against his father in the Circuit Court, and which judgment was affirmed by the Supreme Court.

Upon the suing out of the injunction in this case, the defendant in this suit and plaintiff in the execution issued from the 13th District Court, of the State of Louisiana, being a citizen of Mississippi, removed the case to the Circuit Court, under the Act of March 3, 1875. The plaintiff, Frank Watson, by his counsel, appeared and moved to remand the case, for want of jurisdiction in this court, *ratione personœ* and other grounds, which were decided against him. See 2, Woods. R. 166. One year and two months after court had received and retained jurisdiction of this case, Frank Watson, without notice to Mrs. Bondurant, or her counsel, re-opened the case in the State District Court, and took an *ex-parte* judgment with damages against the plaintiff in execution. The judgment in the State Court we were compelled to appeal to the State Supreme Court, in order that our rights might be protected, eventually, by writ of error to the U. S. Supreme Court. The Supreme Court of Louisiana affirmed substantially the judgment of the lower State Court.

As the Supreme Court of Louisiana have in their decision adopted the grounds assumed by our learned adversary and have elaborated their decision in a voluminous opinion, on file in this suit, we shall first ask the attention of this court to the doctrines enunciated in Watson vs. Bondurant No. 6564, on the docket of the said Supreme Court, 30th Annual Reports, page 1.

The Supreme Court of Louisiana, Hon. R. H. Marr being the organ of that court, assuming that Frank Watson is innocent third possessor of the property in controversy, and that the property is *his* property, proceeds to lay down two absolute propositions touching the construction of article 3369 of the revised Civil Code, which is as follows:

"The *registry* preserves the *evidence* of mortgages and privileges during ten years, reckoning from the day of its date: its effect ceases, even against the contracting parties, if the inscriptions have not been renewed before the expiration of that time, in the manner in which they were first made."

"But this rule does not obtain with regard to the mortgages to which husbands are subjected for the dowry, and other claims of wives, and tutors and curators towards minors, interdicted and absent persons, whose estate they administer.

"The reinscription of mortgages is dispensed with in certain cases provided by special laws."

The first proposition of that court is:

"*First—That under the positive language of the Civil Code and Statutes, nothing supplies the place of registry or dispenses with it, so far as those are concerned who are not parties to the mortgage.*"

If this language of the Supreme Court of Louisiana is intended to apply solely to that first registry or recordation required by the law of Louisiana, as to all acts authentic or under private signature, which are translative of immovable property, in order to affect *bona fide* purchasers and creditors, and third persons in general, then it is not a truism, for Article 2442 of the Revised Civil Code, says:

" But this defect of registering shall not be pleaded between the parties who shall have contract in such act, *their heirs or assigns*, who are as effectually bound by a sale made under private signature, as if it were by an authentic act."

Art. 3343 says. " By the words, *third persons*, used in the foregoing Article, are to be understood all persons who are not parties to the act or to the judgment on which the mortgage is founded."

And Article 3344: " Consequently, neither the contracting parties nor their heirs, nor those who were witnesses to the act by which the mortgage was stipulateted, can take advantage of the non-inscription of the mortgage."

It is true that Art. 2266 says: " all sales, contracts and judgments affecting immovable property which shall not be so recorded, shall be utterly null and void except between the party thereto, etc. The recording shall have effect from the time when the act is deposited in the proper office and indorsed by the proper officer."

But this Article evidently refers only to the first inscription.

OF THE SECOND PROPOSITION.

The second rule laid down by the Supreme Court of Louisiana, in this case No. 6564, is as follows:

" *That where ten years have elapsed from the date of* *the inscription, without re-inscription before that time, the mortgage is without effect as to all parties whosoever who are not parties to the mortgage.*"

This ruling if established, and if to become a settled construction of article 3399, R. C. C.—is absolute and unqualified, and without exception save the parties to the mortgage. If the mortgage *is* without effect. it dies, is prescribed as to all other persons *whosoever*, and is without precedent in our reports, save in two instance; namely, the case of Roche vs. Groysillier, 13th L., p. 238, and that of Gravier's Ex. vs. Hodge, 14 L., 101. These cases were decided in 1839, by three of the ablest justices that have ever presided in our courts—Judges Martin, Rost, and Eustis The decision being pronounced by Justice Rost. But when the point came up before them a second time, as it did in 1847, Justices Eustis and Rost, still on the Supreme Bench, who had pronounced the decisions in the case above named, recanted this error, and in the case of Shepherd vs. The Cotton Press, 2 A., 101, 113, Judge Rost said:

> "We do not understand article 3333 (3369, R. C. C.) as providing for the prescription of mortgages, but on the contrary, as recognizing the right of reinscription after ten years. The French side of that article clearly expresses the intention of the legislature. It is the effect of the inscription which ceases, not the effect of the mortgage. If the prescription of the mortgage had been intended, it would have been so expressed. *Prescription never attaches by implication*"

It was also held in this case that neither inscription nor reinscription was necessary between the parties to the contract. See Townsend vs. Harrison, 2 A., 174, Seyburn vs. Deyris, 25 A., 483.

These articles are all *in para materiæ*, and must be construed together and cannot be applied separately, or legal solicism will be the result. These Articles, it is plain, have reference to inscription only—not to reinscription. There is but one Article in the Code that applies to this case, and that is Article 3369, regarding *reinscription*, this being a question of *reinscription* and not of *inscription.* Our laws of registration are by no means uniform, but are absolute, arbitrary, sometimes inconsistent, having as many exceptions as rules. Witness the incongruity between Article 2442, requiring an actual delivery of the thing sold as well as registry, in order to have "effect against the creditors of the parties and third persons in general;" and Article 2246, by which, sales to be valid against *bona fide* purchasers and creditors, only require to be registered according to law.

As regarding reinscription, Article 3469, paragraph 2, itself excepts the mortgages of wives on their husband's property, and those of minors against tutors and curators, of interdicted and absent persons, whose estate they administer. The Poydras Asylum, all railroad and canal companies and the Real Estate Banks are excepted under special laws. Touching our laws of registration, the Supreme Court of Louisiana said:

"Registry laws are artificial rules, the creatures only of positive legislation. As they tend to multiply forms in the transmission of property, and to restrict the natural right of a man to do what he will with his own, they have seldom, if ever, been extended by judicial construction to cases not within their plain and obvious intendment." Johnson vs. Bloodworth, 12 A. 701.

In Bonin vs. Durand 2 A. 776, it was held, 'That by the omission to reinscribe a mortgage within ten years from the date of the first inscription, the effect of *the inscription*, not the mortgage itself, ceases. The mortgage is unimpaired thereby between the mortgagor, and those claiming under him, and the mortgagee. The doubt that has arisen on this point, as to the proper interpretation of Article 3333 [3369 R. C. C.] has arisen from the inaccurate translation of the French text."

Thus, with all respect for the Court, we submit that the Louisiana Supreme Court has by the their rulings in this case disturbed the *stare decisis*, a rule which Lord Mansfield styles "the most sacred rule of the law," to adopt an ancient decision, which grew out of a mistranslation of the French text of Article 3333, C. C., in the Code of 1825. It strikes out also from our system of law that wise and equitable doctrine of notice. Judge Martin, who at one time was much esteemed as an authority in matters touching the construction of our laws, said in the case of The Planters' Bank of Georgia vs. Allard:

"The old Code Civil 464, Art. 52, in order to protect the good faith of those who may be ignorant of mortgages, and to prevent fraud, required them to be recorded in the office of a recorder in the City of New Orleans for whole territory. To permit, therefore, the bad faith of a person who has knowledge of the existence of a mortgage to avail himself of the protection provided by this law, (Registry) for the good faith of the ignorant would be rather to thwart, than to promote the views of the legislator."

Judge Martin considered that the legislature acting upon the jurisprudence, as established by the court, incorporated their spirit in Art. 2242, of the Code of 1825, [Art. 2246, R. C. C.] and adds:

" We take it now to be a settled rule that the actual knowledge of a purchaser of an existing mortgage, is equivalent to the notice resulting from the registry." Planters' Bank vs. Allard, 8 N. S. 136.

In the case of Patterson, vs. De la Ronde, 8 Wall 292, 300, said:

"Besides, the object of all registry laws is to impart information to parties dealing with property respecting its transfers and incumbrances, and thus to protect them from prior secret conveyances and liens. It is to the registry, therefore, that purchasers, or others desirous of ascertaining the condition of property, must look, and if not otherwise informed, they can rely upon the knowledge there obtained. But if they have notice of the existence of unregistered conveyances and mortgages, they cannot, in truth, complain that they are, in any respect, prejudiced by the want of registry. In equity, and in this country generally at law, they are not permitted to defeat, under such circumstances, the rights of prior grantees or incumbrances, but are required to take the title or security in subordination to their rights. The general doctrine is that knowledge of an existing conveyauce or mortgage is, in legal effect, the equivalent to notice by the registry. And such is the law of Louisiana, as expounded by the decisions of her highest court. Thus, in *Robinett* vs. *Compton*, (2 A. 847, 854,) that court said: "The doctrine is now well settled, that the actual knowledge by a purchaser of an existing mortgage or title is equivalent to a notice resulting from the registry. The formality of recording is for the benefit of the public, and for the purpose of giving notice to individuals. But if a party have knowledge of that of which it is the purpose of the law to notify him, by causing an act, instrument, or lien to be recorded, the effect is the same, and he is as much bound by his personal knowledge as if his information was derived from an inspection of the record."

" The cases of *Planters' Bank of Georgia* vs. *Allard*, *Bell* vs. *Haw*. *Rachal* vs. *Normand*, and *Swan* vs. *Moore*, are to the same effect.

"In the case at bar. Patterson had knowledge of the mortgage and vendor's privilege of Hoa. They are stated in the mortgage to himself which he placed on record. If, therefore, the act of sale, stipulating for the special mortgage and ackowledging the vendor's privilege, had not, in fact, been recorded, he would have been bound by his knowledge of their existence. He could not have urged the want of inscription to defeat Hoa's priority, and. for like reasons, he cannot urge the want of reinscription.

" Prescription of the mortgage and vendor's privilege did not follow from the omission to reinscribe the act of sale. From its nature, prescription could not have begun to run until the debt be secured had matured." See Robinett vs. Compton. 2 A. 854 ; Shepherd vs. Cotton Press, 2, 113 ; Planters' Bank vs. Allard, 2 N. S. 136 ; 6 Rob. 88, 243 ; Swan vs. Moore, 14 L A. 833 ; Parker vs. Walden, 6 Martin N. S. 713 ; Noble vs. Cooper, 7 Rob. 44.

In the case of Levy vs. Mentz, 23 A. 261, the immediate predecessors of our present bench, Ludeling, Chief Justice being the organ of the Court, said of the case of Patterson vs. De la Ronde, 8 Wall.

" We have been referred to a decision of the Supreme Court of the United States, reported in 8 Wallace, in which that exalted tribunal held that in Louisiana knowledge of an existing mortgage was equivalent to or dispensed with registry, and the counsel for the opponent earnestly urges that we should follow their interpretation of the laws of Louisiana. It does not appear that the Supreme Court of the United States had their attention directed to Article 3369 of the Civil Code or the amendment of Article 3333."

We find no change between the two Articles, except the substitution of the word "*its*," for "*their*," it simply correcting the translation of the French Article and assimilating the text of the Article to the current decisions, and forms no pretext for changing a rule of property so well established in our law as the doctrine of notice.

But the said Court, never went as far as the late Supreme Bench has gone in the case under discussion Their predecessors merely decided that the mortgage perempted or lost its rank, and not that it lost its effect as to all persons '*whoever*' who were not parties to the mortgage. Peremption is not prescription, but only loss of rank between mortgagees and privileged creditors.

OF THE JUDGMENT

The matter of the non-inscription of the mortgage, evidenced by the Sheriff's deed to J. H. and A. Bondurant, has been thus treated at large, not that we consider it as forming the primary question in the case, but for the reason that it has been the occasion of a great expenditure of argument and ink on the part of counsel, and which has led the Supreme Court ot Louisiana to regard it as the single question in the case. But on the 9th day of November, 1867, this mortgage became merged in a judgment of the 13th District Court of the Parish of Tensas. That judgment describes the land and orders this, with other lands subject to the minor's mortgage, to be seized and sold, to pay and satisfy the minor's claim. That court was a court of competent jurisdiction. The writ issued under it was never opposed or enjoined by any of the parties thereto, nor by Watson, who claimed under one of the parties defendant. It was never appealed from, but on the contrary, was acquiesced in by all parties to the judgment, and became *res adjudicata* between the parties thereto and all claiming under them.

"The judgment of a court of competent jurisdiction cannot be attacked collaterally—its decree directly on the point reviewed is a plea of evidence, conclusive between the same parties or those claiming under them for the same thing, and can be attacked only by appeal or action of nullity." 11 M. 608; 2 N. S. 292; 14 L. 214; 19 L. 198.

"It matters not under what form, whether by petition, exception, rule or intervention, the question be presented: whenever the same question recurs between the same parties cited under a different form of proceedings, the exception of *res adjudicata* estops." Plicque vs. Peret, 19 L. 318; 12 A. 197.

A judgment is the highest evidence of a debt, and the title merges in the judgment. So when a judgment is had upon a note, the latter is merged in the former, which only by its reversal or rescission can it be severed. The debtor cannot then plead against the claim thus merged in the judgment, any prescription than that which bars the latter. 9 L. 418; 1 A. 372; 3 A. 386; 7 A. 334; 9 A. 339; 14 A. 205, 231, 261,; 2 N. S. 605.

A judgment neither creates. adds to, nor detracts from a debt. It only declares its existence, fixes the amount and secures the creditor the means of enforcing its payment. So if a debt create a privilege or tacit mortgage, they exist independent of the judgment. 18 L. 414; 9 R. 110; 10 R. 412, 155.

This judgment thus unappealed from, and acquiesced in and permitted to be executed by all the defendants thereto and their assigns, and based on a valid consideration, to-wit., the minor's rights in the succession of his grandfather, which cannot be prescribed against (Article 3526). For prescription does not run against a beneficiary heir, with respect to the debt due him by the succession. Thus, then, this judgment, in which the mortgage was merged is *res adjudicata* against the defendant parties thereto, and those claiming under them, for we have been shown by Article 2442, that the want of registry cannot be pleaded by the parties to the mortgage, their heirs or assigns. This judgment is a contract between party plaintiff thereto and the State of Louisiana. whose court, a competent tribunal, pronounced, and it cannot be ignored and treated as a nullity, without violating both the Constitution of the State of Louisiana, Art. 110, and the Constitution of the United States, par. 2, Sec. 10, Art. 1. It not to be said, with any show of logic or reason, that the mortgage lost its effect by reason of non-inscription within ten years, for the decision of the Supreme Court in this case excepts the parties to the contract, and this Article from the R. C. C. says that want of reinscription shall not be pleaded by "the heirs and assigns of parties to the contract."

A. C. Watson waived by notarial act the certificate of mortgage. See deed from J. A. Bondurant to A. C. Watson. And so did the plaintiff in his father's deed to him, his son.

OF THE INSCRIPTION.

The law of Louisiana, Art. R. C. C. 3411, provides six ways by which mortgages may be extinguished, namely: by payment; by revocation; by voluntary remission; by compensation: by confusion; by loss of the thing; by nullity and rescission; by the effect of the dissolving condition; and lastly, by *prescription*. Therefore, by whatever name it is called, it is in this case but the application of the doctrine of prescription of ten years, which cuts off a minor's rights to succession property, and gives the benefit of the ten years prescription, *acquirenda causa*, to Frank Watson, plaintiff in the injunction, who purchased from his father the rights of John Bondurant, who held the property and sold the same to the father, A. S. Watson, subject to an existing mortgage, containing the pact *de non alienando*.

Whe have shown that in the case of Shepherd vs. Cotton Press, the Supreme Court said that prescription does not apply to mortgages and never attaches by implication. And by the decision of the court in this case, the mortgage still survives between the original parties, and Article 3522 says, Minors and persons under interdiction cannot be prescribed against except in cases specified by law.

Art, 3542. This prescription only commences against minors after their majority. Also Art. 3554.

Is there one word in Article 3369 which *specifies* or *expresses* that it is intended that it should run against minors ?

See also Art, 3526. Prescription does not run against a beneficiary heir with respect to the debt due him by the succession.

Art. 977. Minors are beneficiary heirs by operation of law.

But these articles above cited, which prohibit the application of prescription against minors are not the only articles that must be abrogated before the Supreme Court of Louisiana can establish the doctrine they propose, that the effect of the mortgage ceases, as to all persons whatsoever, *who are not parties to the mortgage*, viz :

Art. 3282. The mortgage is a real right on the property. bound for the discharge of the obligation.

It is in it nature indivisible, and prevails over all the movables subjected to it, and over each and every portion.

It follows them into whatever hands they pass.

Art. 3397. The mortgage has the following effects :

1. That the debtor cannot sell, engage or mortgage the same property to other persons, to the prejudice of the mortgage which is already made to another creditor.

2. That if the mortgaged thing goes out of the debtor's hands, the creditor may follow it in whatever hands it may have passed.

Art. 3301. Such as only have a right that is suspended by a condition. and may be extinguished in cercases, can only agree to a mortgage, subject to the same condition, and liable to the same extinction.

Art. 2561. If the buyer does not pay the price, the seller may sue for a dissolution of the sale.

There is no prescription of a mortgage or the resolutory condition. Gentes vs. Blascoe, 20 A. 403 ; 23 A. 97 ; 12 A. 701.

They exist as long as the obligation to which they are accessory.

Art. 2562. The term being expired without the buyers yet having paid the price, the judge shall cancel the sale.

Prescription does not run until the right of action has accrued. Gueno vs. Soumastre, 1 A. 44, Patterson vs. De la Ronde. 8 Wall. 282.

The very idea of an obligation with or without a term of payment being denied the usual term of prescription allowed by law, is to the legal mind of this country incomprehensible.

Let us see how short a step from such a dogma to the absurd.

Suppose, at the date of the partition and mortgage, the minor, whose rights in the succession were sold, had been but one year old, then at the age of eleven, the mortgage, according to the ruling of the court, ceases to have effect to all persons whatsoever, saving the parties to the mortgage ; and the land having been sold by the mortgagee, is it not a spoilation of the minor's inheritance by means of this law ?

Suppose this obligation, whose only recorded evidence is a few lines in a sheriff's deed, had in addition thereto, been evidenced by a note payable in ten years, will the Supreme Court of Louisiana contend that no prescription term would attach to the note, or that the mortgage to the minor receiving it would lapse in ten years? Or that the law could be so perverted as to leave the minor to exist for a decade of his minority and find himself the impoverished victim of the law? The law that in the creation of an obligation, especially a minor, so provides that the remedy is taken away at the moment it matures, is a legal paradox.

Finally, under this head, we invoke the decision of the Supreme Court of the United States, in the case of A. C. Watson, plaintiff in error, vs. W. E. Bondurant, defendant, as *res adjudicata*, between the parties to that judgment and all claiming under them, which is a sufficient guide for the decision of this court in this case,, and we invoke the Act of Congress of the 11th June, 1864, which says: "That whenever during the existence of the present rebellion, any action, civil or criminal, against any person, who by reason of the resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of action, or arrest of such person the time during which such person shall be beyond the reach of judicial process, shall not be deemed or taken as any part of the time limited by law for the commencement of said action."

This statute was considered and adjudicated upon in the case of Stewart vs. Kahn, 11 Wall, 493. (Our present opponent being couusel on the losing side,) which went up from this State. In that case, the court said that the Act of June 13, 1864, was not prospective alone in its operation, but applied to cases, whether before or after the passage of the Act so constructed, was constitutional. See also Levy vs. Stewart, Steinback vs. the same, 11 Wall. 244, 566; also Hanger vs. Abbot. 6 Wall, 532.

Now, the statement of facts by the court in the case of W. E. Bondurant vs. A. C. Watson, which statement was agreed upon by both parties, and is on file as evidence in this case, shows, and the court further finds that there were no District Courts held in the parish of Tensas, from the month of November, 1861, until November, 1865, a period of five years.

See the testimony of Thos. P. Farrar, on file in this suit.

OF THE STATUS OF FRANK WATSON, PLAINTIFF IN THE INJUNCTION.

We have shown that the failure to reinscribe a mortgage, within ten years from the date of the first inscription, does not, according to the established jurisprudence of Louisiana, work an extinguishment of the mortgage; and that by the decision of the Snpreme Court of Louisiana, in this case it still survives, as to the parties to the mortgage.

We have shown, by the positive language of the

Article 2442, R. C. C., that the heirs and assigns of the parties to the act cannot plead want of registry.

By Art. 3301, we have shown:

> "Such as only have a right, that is suspended by a condition, and may be extinguished in certain cases, can only agree to a mortgage, subject to the same conditions and liable to the same extinction."

As with a mortgage, so with a sale or any act translative of immovable property. The dissolutory condition is implied in all synallagmatic contracts translative of real property, as shown in Art. 2561. That if the buyer does not pay the price, the seller may sue for a dissolution of the sale.

With these elementary provisions of our Civil Code, we have been at loss to understand by what course of reasoning the Supreme Court of Louisiana have reached a conclusion, by which the assign of one of the mortgagors becomes the possessor of property to the exclusion of the minor heir whose rights in the succession are secured by mortgage in the property claimed, for which the purchasers have never paid the price.

The grounds set forth in Frank Watson's petition for an injunction are, that he claims, by virtue of purchase by his father, of the 'possession and ownership of John Bondurant, etc. He claims to stand in the place of John Bondurant, who possessed the property, subject to a mortgage containing the pact *de non alienando*.

He held the property subject to a condition and liable to be extinguished, in case the condition, the payment of the price, was never paid, and could not sell or mortgage the property, except subject to the same condition and liability to extinction, as we have seen from Art. 3301. Or, as laid down by Chief Justice Merrick, dissenting, in Johnson vs. Bloodworth, 12 A. 701: "*No one can transfer a better title to another than he himself possesses.*" A. C. Watson, Sr., purchased and held under a like title from his father, and he purchased in 1875, after the reinscription of the mortgage and its merger in the judgment, which also was duly of record.

"An alienation made in violation on the pact *de non alienando,* is ipso facto null and void as it relates to the creditor." Nathan vs. Lee, 2 N. S. 32.

"In contemplation of law, the whole of the land remained in the possession of the original debtor." Smith vs. Nettles, 13 A. 242.

"No sale or partition of the mortgage property can defeat the mortgage previously existing theron. Lee vs. Packard, 25 A. 397.

"The defendants, in partitioning the property among themselves and making partial payments, (as in this was done) could not limit the operation of the mortgage upon the whole, because the mortgage was an indivisible obligation." Lee vs. Packard, 25 A. 397; Burnside vs. Palmer, 1 Woods, 180.

We conclude with the question propounded by the court in the case of Villa Palma vs. Abat & Generes. *But what right has the defendant to complain of the sale of property which he only held subject to the rights of the* *vendor's mortgage creditors? With the non alienation clause he could not expect to be made a party to the sale.*" Villa Palma vs. Generes, 21 A. p. 11.

The maxim, *lex non cogit ad impossibilia*, and *lex neminem cogit ad vana seu impossibilia*, are principles of equity underlying all law, for the same reason that our Code declares contracts void for fraud and violence. The present bench had the misfortune to adopt the views of their immediate predecessors in the case before them, but we are informed that since its decision they have, from the bench, in another case, announced their intention not in the future to be bound by the decision of their predecessors regarding the construction of the doctrine of prescription.

The decision of the Supreme Court of Louisiana would seem to read out of our law all binding effect of the pact *de non alienando*, save as to the manner of procedure. In doing so, they seem to us to ignore Article 1945, R. C. C., which says;

"Legal agreements having the effects of law upon the parties, none but the parties can abrogate or modify them. Upon this principle are established the following rules:

"1. That no general or special legislative act, can be so construed as to avoid or modify a legal contract previously made.

"2. That courts are bound to give legal effect to all such contracts, according to the true intent of the parties.

"3. That the intent is to be determined by the words of the contract, when these are clear and explicit, and lead to no absurd consequence."

In Maskell vs. Meriman, 9 R. 69, the Supreme Court of Louisiana said:

"The Code certainly recognizes the validity of the sale of mortgaged property, by defining the rights of third possessors, and regulating the manner of proceeding when the mortgaged property has been alienated. There is one exception to the general rule, and we are aware of none other, where the alienation is not fraudulent and collusive, or simulated, and that is where the original motgagor has in the act of mortgage entered into the pact *de non alienando*. In such a case we have ruled on numerous occasions, the third possessor is not entitled to any notice, and, indeed, is not a third possessor at all," Maskell vs. Merriman, 9 R. 69.

Could John Bondurant confer any better title than what he possessed himself to A. C. Watson, or the latter to his sons or son?

Neither prescription nor reinscription are necessary between the parties to the mortgage. Seyburn vs. Deyris, 25 A. 484.

The parties to the contract, their heirs or assigns, cannot plead the want of registry.

SUMMARY.

Hence, from the foregoing facts and authorities, we conclude:

That the question of the reinscription of the original mortgage is not properly an element in this case, for that.

1st. That the want of registry cannot be pleaded by the parties to the contract of mortgage, their heirs or assigns. Art. 2442, R. C. C.

2. That if the reinscription of the original mortgage be a question germain to the decision of this case, a period from November, 1861, to November, 1865, during which time no terms of the 13th District Court of the Parish of Tensas, must be deducted, and not counted as part of the ten years' time of prescription, and so doing, the reinscription was in ample time, according to the Act of Congress of the U. S, passed June 11th, 1864.

3d. As this point of the want of reinscription, within ten years, was set up as a defense in a suit for the same property, in a suit against A. C. Watson, the father of the plaintiff in injunction, as reported in 21st Wallace, 123, and decided against the father, which judgment is *res adjucata* as between the said A. C Watson, plaintiff in error in said suit and his heir and assign, and the defendant in this suit.

4th. That the original mortgage was merged in a judgment of a court of competent jurisdiction recognizing the said mortgage, which judgment was duly recorded, whereby the said mortgage became subject only to the prescription, applicable to the judgment itself, which said judgment has been revived according to law.

5th. That the said judgment is *res adjudicata* between the parties to said judgment and those claiming under them.

6th. That the said judgment is a contract between the State of Louisiana and the parties plaintiff in said suit, and that the Supreme Court of Louisiana can not ignore or nullify said judgment without impairing the obligation of contracts, in violation of the Coustitution of the United States and of the State of Louisiana.

The filing of the amended bill by plaintiff with exhibit of judgment rendered by the State Court, is irregular and should be stricken from the record. It is a new bill, based on matters transpiring after the writ of injunction was issued and served, and is a new bill based on proceedings had in the State Court after the same had been properly removed, under the Act of 3d March, 1873. Caldwood vs. Trent, 9 R. 227.

Of the application of Chancery Practice in the Federal Courts to State Statutes, and remedies thereunder touching titles of land, it is the positive language of the Supreme Court of the United States, in the case of Clark vs. Smith, on this subject, in 13 Peters, 122:

> "Kentucky [and by parity of reasoning every other State] has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country."

* * * * * *

> "The state legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding of the chancery

side of the federal courts, no reason exists why it should not be pursued in the same form as it is in the state courts; on the contrary, propriety and convenience suggest, that the practice should not materially differ, where titles to lands are the subjects of investigation. And such is the constant course of the federal courts."

* * * * * *

"The undoubted truth is, that when investigating and decreeing on titles in this country, we must deal with them, in practice, as we find them, and accommodate our modes of proceeding in a considerable degree, to the nature of the case, and the character of the equities involved in the controversy; so as to give effect to state legislation and state policy, not departing, however, from what legitimately belongs to a court of chancery."

We ask this Court to apply the principle, which is but reasonable and just to the case at bar. Certainly, if the Court changes the form of action which was summary and a part of the contract, it is with all respect impairing the security which belonged to it when made, and is a great hardship upon the creditor, the defendant in the injunction.

The judgment made an exhibit to his amended bill is null and void, having been taken after the cause was legally removed and the removal complete, and being taken in contravention of a prohibitory law, to-wit: the provisions of the Act of Congress of March 3d, 1875, the proceedings are inadmissible as evidence in this Court. Dillon on removal, 2d, 1877, sec. xv., pp. 56, 67, and notes.

The court will note that this injunction was dissolved Nov. 13th, 1877. On the dissolution of the injunction. as a part of the law of our contract, the same Art. 304, Code of practice, says:

"*That on the trial of the injunction, should it be decided that the injunctson was wrongfully obtained, that that the surety on the bond shall be considered as a party plaintiff in the suit, and in case the injunction is dissolved, the Court in the same judgment shall condemn the plainttff and the surety, (although that plaintiff be a third person enjoining the execution of a judgment between other parties), jointly and severally, to pay to the defendant interest at the rate of ten per cent per annum, on the amount of the judgment, and not more than twenty per cent. as damages, unless damages to a greater amount be proved.*"

OF THE DAMAGES, COSTS AND INTEREST.

If plaintiff fails to maintain his injunction, it is to be taken as wrongfully obtained, and damages will be awarded against him. Florence vs. Nixon, 3 L., 291; Hudson vs. Plawket, 4 L., 526.

The fees of defendant's attorneys may be allowed as special damages. Pargoud vs. Morgan, 2 L., 105; Richard vs. Hariat, 5 L., 246; Hereford vs. Babin, 14 A. 116, 701, 737.

The damages are estimated in the sum due when injunction issues, not the sums due subsequently, 10 L. 579; 13 L. 401; 19 L, 491.

The amount of damages is within this court's discretion under Act 25, March, 1831, No. 45, up to twenty per cent. unless a greater amount be proved.

Seymour vs. Bourgess, 12 L. 123; Wilcox vs. Bundy, 13 L. 381; Lizande vs. Hardaway, 8 R. 20; 14 A. 737.

The dissolution of an injunction is *prima facie* evidence that damages have been sustained. 3 S. B. 289.

Damages are in the court's discretion *aliter* as to interest, which Acts of 1831, 1833 are imperative, must be allowed at ten per cent. on the judgment enjoined against him and his surety. The interest is calculated from the service of the injunction to its dissolution; but reduced to eight per cent. by Act of 14 March, 1855; 37 2 A. 454; 11 A. 91, 220; 10 A. 251, 461. Restored to ten per cent. C. P. 304.

Counsel fees, though exceeding twenty per cent. will, if proved, be allowed as special damages; but nothing more, if no other damages be shown. Act of 1855; William vs. Close, 14 A. 737.

This court will mulct in heavy damages those who abuse the equitable of remedy of injunction; and when no legal grounds are shown for the same, highest damages allowed will be awarded. 14 L. 486; 2 A. 360; 5 A. 155; 10 A. 412, 573; 12 A. 88; 14 A. 119.

OF RES ADJUDICATA.

Successors and *ayans cause* are considered as having been parties when their titles have been acquired since the institution of the original suit in which the judgment was obtained. De la Bigarre vs. City, 3 A. 230.

The effect of *res adjudicata* extends to the successors of the *ayans cause*, the assignee of the parties, and to all who claim through them. 8 A. 126; 12 A. 878.

Wherefore respondent respectfully submits, that as the injunction herein sued out was dissolved on the 13th day of November, 1877, that as the said plaintiff, Frank Watson, is a holder in bad faith, and has abused the most equitable writ of injunction, we respectfully submit that said respondent is entitled to a decree for interest at the rate of ten per cent. on the amount of the judgment enjoined, from the date of the service of the writ of injunction, with twenty per cent. damages, on the sum, according to Article 304 of the Revised Code of Practice; and that for further and other damages, for rents, uses and profits wrongfully withheld from this respondent, as well as fees of counsel incurred in defence of this suit and the dissolution of the injunction.

All of which is respectifully submitted.

SAML. R. WALKER,
Mrs E T Bondurant
Of Counsel for ~~Defendant~~.
tutrix &c Plaintiff Appellant

SUPREME COURT of UNITED STATES.

Nos. 216 and 217.

October Term, 1880.

ELLA F. BONDURANT, Executrix and Tutrix,
Plaintiff in Error,

versus No. 216.

FRANK WATSON, Defendant in Error.

ELLA F. BONDURANT, Executrix, &c.,
Appellant,

versus No. 217.

FRANK WATSON, Appellee.

Brief for Defendant and Appellee in Answer to Appellant's Brief.

E. T. MERRICK and
GEO. W. RACE,
For Frank Watson.

HINTON & MASON PRINT, MASONIC HALL.

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versus No. 216.
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ELLA F. BONDURANT, Executrix, &c.,
Appellant,
versus No. 217.
FRANK WATSON, Appellee.

Brief for Defendant and Appellee in Answer to Appellant's Brief.

The two Transcripts are by agreement to be submitted at the same time and upon briefs covering both cases. In using, as in the above title to the suits, the term plaintiff in error or defendant in error, we do not wish to be understood as conceding that there is a writ of error.

The action in both records is the same. Record No. 216 is from the State courts, and the record of the proceedings in a suit to injoin a *State* judgment and execution in the hands of a sheriff, a State officer. The State Court, thinking it had jurisdiction, refused to order the removal and proceeded to render judgment, and *Mrs. Bondurant*, plaintiff in error, appealed to the State Supreme Court.

Record No. 217 refers to proceeding in the Circuit Court, after Mrs. Bondurant had filed some of the copies of the papers with the said Circuit Court, disregarding the ruling of the State Court.

The State Court case, No. 216, differs somewhat from the other. We understand that we are at liberty (under the written agreement to submit the two cases together) to embody what we have to say *in one brief* instead of repeating the same in two briefs as our adversaries have done. It will certainly save the Court labor.

The appellant's briefs seem to us enveloped with an indistinctness, almost amounting to a mystification growing out of inattention to some clear distinctions running through our law. We believe that the Louisiana law as settled by the courts will be found free from the inconsistencies discovered by the appellant's counsel, if we bear in mind, the following distinctions:

First. Mrs. Bondurant, tutrix and executrix, is not in her said capacity, suing as *owner* of the property. She only claims *in the pleadings* to be a mortgagee of property owned by Frank Watson, for she cannot be an owner and mortgagee at the same time. She says she has a judgment against Horace, John and Albert Bondurant, which has merged the mortgage in itself and condemned a tract of land which has been owned by us and our authors by public possession as owners by title translative of property for more than twenty-six years.

She therefore assumes to do two things:

1st. *To prove that she has a right to seize* and sell our property, under a judgment between other parties. Record 217, p. 42; and,

2d. That she is pursuing the forms of law required to effect such sale.

SECOND. There is a distinction between the provisions of law regulating sales of real estate and mortgages.

A sale is a contract, existing, in the sense of the civil law, *jure gentium.* It is used everywhere.

The mortgage upon lands in the possession of the debtor (unlike the pledge of movables), can only exist under express provisions of positive law. On principle, therefore, every *restriction upon* the right of sale is a limitation of a right existing independently of statutory law.

The mortgage (we use the term as known to the civil law, where the sale with a defeasance is unknown) can only exist here, in Louisiana, in virtue of positive statutory laws.

The distinction will explain why it is held by the French and *Louisiana Courts* that *a mortgage can only exist* by complying with the law allowing it, especially when third persons are to be affected.

Mrs. Bondurant's counsel seems to have forgotten another distinction, viz., that between the unrecorded *contract* of mortgage and the *registry* of the same.

The mere *contract* of mortgage is only good as between the debtor and parties signing the instrument, the mortgage, while the property is unencumbered by judicial or conventional mortgages.

The *registry* of a mortgage gives effect and validity to the mortgage from the *date of the* registry against all the world.

Appellant's counsel also seems to find some difficulty in Frank Watson's title from his father through his brother *in the case in the State Court.* Rec. No. 216. See his brief in that case, p. 4.

The fact has been found against Mrs. Bondurant by both the District and State Courts of Louisiana, and does not properly come up on *a writ of error*, if there be one. Moreover, no particular form of words are needed in Louisiana, in order to convey to or recognize title in another.

In the *Circuit Court case* no such objection could be made to the title, because Mrs. Bondurant admits the sale from John Bondurant, as owner, to Col. A. C.

Watson, 30th November, 1854, and through him to Frank Watson, but alleges that the sale to Frank Watson was fraudulent, because he bought while the ejectment was pending. See answer of Mrs. Bondurant to appellee's bill, Record 217, p. 42.

A suit voluntarily dismissed does not even interrupt prescription.

Smith vs. Gibbon, 6 A. 684; 9 A. 464.

THIRD. The suit of Walter E. Bondurant vs. A. C. Watson, having been a petitory action (an ejectment suit), to recover the land itself, and the judgment of the lower Court having been reversed by this Court, and a *venire de novo* awarded, upon which the plaintiff dismissed and never renewed the suit, can have no influence against another party, Frank Watson, in a mortgage suit.

Matters stand the same they would have done if no such unjust suit had been commenced. The findings of the judge *a quo* in that case, and all his other proceedings are null; for the judgment was reversed, and the suit voluntarily dismissed. The case is reported in 21 Wallace, 123.

The dismissed suit, it will hardly be necessary to observe, could not prevent Col. A. C. Watson from selling the land to his sons, *and the acquisition of the same by Frank Watson in full ownership, before the illegal seizure of the same by Mrs. Bondurant, and the* *suing out of the injunction by Frank Watson* on what appellant's counsel calls a third opposition.

WE WILL NOW PROCEED TO DEVELOP THE TWO CASES ACCORDING TO OUR VIEWS OF THE LAW. We believe that the State case, No. 216, has never been brought up, and the development of that point is the only thing in which the argument does not apply to both cases.

Actions to enforce mortgages under the Louisiana laws, are divided into two kinds, *ordinary* and *executory*.

The former are commenced by citation and service of petition, and delays are allowed in the proceedings; the defendant is heard before a judgment can be rendered against him. When such judgment has been rendered, it is at length *res judicata*.

It requires proper parties to maintain it, and they must be brought into Court by service of both *petition and citation*. Thus the Code of Practice says:

"Article 206. Citation being the essential ground of all civil actions in *ordinary proceedings*, the neglect of that *formality* annuls radically all proceedings had, unless the defendant have voluntarily appeared to the suit and answered the demand."

"But citation is not necessary in *executory* proceedings, nor when the proceedings are *in rem* against the thing, as hereafter provided."

AFTER A PARTY HAS ONCE RESORTED TO AN ORDINARY

ACTION, *he can never afterwards resort to the executory process.*

DeGruy's Syndic vs. Hennen, 2 L. R. 546-547.
Gurlie vs. Croquet, 3 N. S. 502-503.
Watson vs. Bondurant, 30 Ann. 10-11.
Succession of Patrick, 25 Ann. 154.
Hall & Lish vs. Belden, 29 Ann. 118.
Page vs. Generes, 6 Ann. page 551.

Plaintiff's suit, *via ordinaria*, having been dismissed as of non-suit, he cannot afterwards resort to the *via executiva*. 30 A. Oliver, widow Bienvenu, vs. Decuir, sheriff." Louques Digest, page 293, IV, No. 9.

The reason is, that the executory process is a harsh remedy, and is therefore *stricti juris*.

In 1866, Walter E. Bondurant, having the *choice of jurisdiction*, and the right to bring at his pleasure a suit in the Courts of the United States or in the State Courts, they having concurrent jurisdiction, upon a mortgage which he claimed, decided to bring his suit in the State Court, which then seemed to him the most advantageous. He therefore brought in the *Thirteenth District* Court *of the State of Louisiana* for the parish of Tensas, a suit upon his mortgage against his three paternal uncles, John, Albert and Horace Bondurant, to enforce the same upon a large plantation bougnt by them at his grandfather's probate sale (but described according to the subdivision of the Land office), and in their possession, as it was supposed.

Of necessity, the selection of *the State Court* for the prosecution of his claim, gave that Court *jurisdiction, mesne and final*, a RIGHT to issue citations and cause them to be served, as well as *the right* to enforce any judgment which might be rendered in the cause, and to regulate the execution of its own judgment.

See Petition, 16–17; Citations, 18–19; Record, 216.

The case of W. E. Bondurant against his three uncles Bondurant, seems to have been contested; for the defendants answered the petition, (Record 216, p. 20–21), but judgment was rendered November 14th, 1867, in favor of Walter E. Bondurant, against them, for $37,118 50 and interest, recognizing a mortgage *against them*, as of the date 4th December, 1852, on certain tracts of land composing the plantation, and also including a separate and remote tract of land containing about 160 acres not in their possession, but bought by A. C. Watson, Sr., of John Bondurant, November, 1854, for $5,575 cash, said tract of land having been possessed by Watson since that time as owner, by title translative of property in virtue of his purchase, p. 21–22; said John Bondurant having acquired the separate ownership previously by a partition.

The plaintiff in the said suit issued execution in December, 1867, against his uncles Bondurant, and sold in February, 1868, (as in their possession,) all the lands described in said decree, and thus including the property described in the decree in his suit against them. W. E. Bondurant became purchaser for $4,478, of the whole in *globo*. See statement of this part of case in

Watson vs. Bondurant, 21 Wal. 123, Record, pages 22–24. At this time no one supposed the description of the property in the decree and execution against the Bondurants embraced the separate piece of property owned so many years by Col. A. C. Watson, the vendor of defendant in error. In 1869, on examining his titles, it seems, W. E. Bondurant discovered the fact, commenced the petitory action mentioned, against Col. A. C. Watson, (the plaintiff in the writ of error in 21 Wallace, 123), to recover the 160 acres in his possession, in virtue of the erroneously supposed purchase at sheriff's sale.

W. E. Bondurant failed, in his petitory action in this Court, and voluntarily dismissed the same. He subsequently died at his residence, in Natchez, Miss., leaving as his heir a minor son, and a will making his wife executrix.

Under the Louisiana law the Judge of the place where the principal property is situated (in the absence of *domicil*) has jurisdiction to grant letters testamentary to executors *residing in the State*, without requiring security from them, but *not* if they reside out of the State.

Mrs. Bondurant's father has always resided in New Orleans. Immediately after her husband's death she came back to reside with her parents, the domicil of all her life prior to her marriage, and she has resided ever since in New Orleans.

And she availed herself of this fact of residence in

Louisiana, to obtain letters of executorship upon her husband's estate, which embraced the said large Bondurant plantation in the parish of Tensas, La., without giving bond. See her petition, page 9, marginal paging 19, June 19 1874.

She made herself party to the judgment and obtained in her capacity of executrix as aforesaid from the 13th District Court for the parish of Tensas, on an ex parte order, without notice to any one, for an execution upon the judgment rendered in 1867, against the three Bondurants, John, Horace and Albert, and in favor of the testator, pages 26-27.

Upon this order, Mrs. *Ella F. Bondurant*, ex., &c., took out an execution in her said capacity and caused the sheriff of the parish of Tensas to levy the same on the tract of land which had then been in Col. A. C. Watson's possession for twenty years as owner under the pretence that the tract of land in possession of the defendant in error was bound by the judgment *against the Bondurants*. See sheriff's return, page 28.

This defendant in error thereupon brought the suit of injunction, or third opposition as called by the appellant's counsel, in the Thirteenth *District Court of the State of Louisiana*, to injoin the sheriff and Mrs. Bondurant from selling his property under such decree against the Bondurant's execution, the force ofwhich he denied.

The petition sets out the purchase of the property by Augustus C. Watson in 1854, from John Bondurant, and public and undisturbed possession under title translative of property; that any mortgage that said W. E. Bondurant had ever had on the same, if any, had become perempted, for want of reinscription; that said judgment against John, Albert and Horace Bondurant was also null and void as against them and, third persons, on the ground that the price of slaves was the consideration for a large part thereof, etc., pages 1 and 2. The good faith of the Watsons without notice and for a full price is affirmatively shown. See Col. A. C. Watson's testimony, Record 217, page 110, answer to 4th interrogatory.

An application was made to the State Court to remove this injunction into the Circuit Court of the United States by Mrs. Bondurant, *and the same was refused by the State Court.*

A judgment was rendered in the State Court against the sheriff and plaintiff in error, perpetuating the injunction and decreeing her to pay two hundred and fifty dollars damages. Page 44.

She appealed to the Supreme Court of the State. That Court in effect reversed the judgment of the Thirteenth Judicial District Court *as to damages, but affirmed* it in Watson's favor in other respects.

Mrs. Ella F. Bondurant, executrix and tutrix, after a supplemental bill had been filed in the Circuit Court, applied to the Chief Justice of Louisiana for a writ of error from the decree of the Supreme Court.

That officer, *the Chief Justice*, addressed a paper *in* *his own name*, as such officer, to the Clerk of the *Supreme Court* of Louisiana, wherein he acknowledges his willingness to permit the case to be considered by the Supreme Court of the United States at Washington, and commands the Clerk of the Supreme Court of Louisiana to send up the records accordingly. This is followed by the test of the same Chief Justice of the State Court, and signed by "Alfred Roman, Clerk of the Supreme Court of Louisiana." This singular document is found in Record No. 216, page 66, page 67.

We take the trouble to narrate the foregoing facts in regard to said document, because we do not feel justified in assuming that this case has, *by a writ of error*, *ever* been removed from the Supreme Court of Louisiana, into the Supreme Court of the United States. It seems to us that such an instrument cannot supply the want of a writ of error. The law has prescribed the officers and Courts which may issue the writ. Having invested them with the power, we know of no others who can assume that jurisdiction. Revised Statutes, 1003–1004.

The paper, instead of being a writ of error from this Court and in the name of the President of the United States, and under any authority of the United States issues in the name of the Chief Justice of Louisiana, and under *his sole authority*, commanding his clerk to do certain things, and that clerk attests the paper.

A WRIT OF ERROR IS ESSENTIAL TO JURISDICTION OVER A STATE COURT. Rev. Stats. § 709.

In certain matters of form, and in certain particulars mentioned in Section 1005 of Revised Statutes, this Court allows *amendments to writs of error.* But it does not seem to us, that the power to *amend* in certain specified particulars can be fairly extended to the making of a writ of error *de novo* or *nunc pro tunc* to supply a total want of the writ. Nothing short of the power to make a writ *nunc pro tunc* seems to us sufficient to give this Court jurisdiction in this case, for consent cannot give jurisdiction.

Mills vs. Brown, 16 Peters, 525;
West vs. Barnes, 2 Dallas, 401;
Mussina vs. Cavazos, 6 Wal. 358.

A thing which does not exist, cannot be amended.

It seems to us that what Solon said in his work on nullities would have some force here, as a reason and by way of analogy. In his work (Brussel's Edition 1836), chap. XVI, sect. 1, § III, No. 334, page 258, he says (we translate): "A person can only confirm or ratify that which really exists, although wanting in vigor. Then, only acts which exist, and so long as they are not attacked, and which give rise to an action, although subject to being defeated by a plea, are susceptible of ratification. In other words, a person can ratify only acts against which the law admits an action of nullity or rescission (art. 1338 of the Civil Code), and which, following article 1304, only last ten years. An act, struck with the nullity of non-existence, an agreement vicious in one of *its essential conditions,* a solemn contract, which is not made in form, not giving rise to an action, *cannot be ratified; they must be made de novo. Quod nullum est non potest confirmari.*"

Suppose the justice of the peace had issued a similar paper in the California passenger cases, or one of the lawyers in a cause had issued a writ of error on their own authority, in the same form, would not such supposed writ be equally as valid, to carry up a cause, as the one in this case?

Leaving the question of the jurisdiction for want of a writ of error to the consideration of this Court, without further comment, we come now to consider THE QUESTION WHETHER THE RECORD OF THE CASE IN THE STATE COURT PRESENTS ANY SUCH ERROR in the rulings of the Supreme Court of Louisiana as will justify this Court in reversing its judgment.

Our adversary says that the State Court erred in continuing to entertain jurisdiction over the case after the plaintiff in error had applied to the District Court of the State to remove the same. The proposition requires the consideration of several matters, such as the sufficiency of the petition for removal, the citizenship of the plaintiff in error, as well as the nature of the proceeding sought to be removed and the jurisdiction of a State Court *over its own judgments to revise them*, and *over its own executions*, and *over its own officers* charged with such writs and seized of actual possession.

It is hardly necessary to observe, that Frank Watson's counsel *strenuously opposed*, *in the Circuit Court*, *the assumption of jurisdiction by that tribunal.* See objections (Record 217, pages 17 and 18) covering all the points we urge before this Court.

I.

Extract from the Revised Statutes of Louisiana, 1869

" Section 1460. Whenever a testamentary executor " named in the will shall be present in the State, but " be domiciled out of it, the Judge shall only grant " him the letter" (of executorship) "on the *execution* " *of his bond* with a good and solvent security in such " a sum and under such conditions as are required " from *dative* testamentary executors." Revised Statutes La., page 287, section 1460.

In order to avail herself of the benefit of this act, the plaintiff in error, residing with her father in New Orleans, in her petition for letters of executorship, indicated her abandonment of her domicil in Mississippi, and declared *that she was then residing* in New Orleans, in Louisiana, 19 June, 1874, No. 216, page 9, margin, page 19.

"Sec. 1202. Residence once acquired shall not be for- " feited by absence on business of the State or of the " United States, but a voluntary absence from the State " of two years or the acquisition of residence in any " other State of this Union or elsewhere, shall forfeit a " residence within this State. Revised Statutes La., page 238.

The judge, on her statement of domicil (*for residence* *and domicil* are synonymous in the Louisiana law), appointed her executrix without bond. Record, pages 9 and 10.

THE FIRST POINT WE MAKE UNDER THIS HEAD IS THIS: Plaintiff's petition for removal does not show that Mrs. Bondurant was a *citizen of Mississippi* on the 28th day of June, 1875, the time the *petition for an injunction was filed and served* in the State Court. Her petition for a removal, filed 18th October, 1875, and sworn to September 13, 1875, simply alleges, that she is (in the present tense) that is, September 13, 1875, a citizen of the State of Mississippi. Record, page 5.

It does not show what was her citizenship *in June, 1875*, when the petition for an injunction was filed and served. On this point the two decisions of this Court, the one Insurance Co. vs. Pechner, 95 U. S. Rep. 185, and the other Amory vs. Amory, 95 U. S. 186 and 187, are decisive of the question. See also Gold Washing & Water Co. vs. Keys, 96 U. S. 201. Under that state of the case the State Court, was "not" (as this Court says) bound "to surrender its jurisdiction." 95 U. S. 187. *The plaintiff in error did not state a case in her petition, which entitled her to remove the case* under any point of view into the Courts of the United States. And it is fairer to her to put this construction on the petition, than it is to suppose that she intended to commit a deliberate fraud on the Courts of Louisiana, when she applied for letters of executorship.

II.

The plaintiff in error not only failed to state a proper case for removal in her pleadings, but the *proof* also repels her pretensions.

She came back to Louisiana, her ancient domicil, to reside, and availed herself of the advantages of such citizenship to take and hold her letters testamentary without giving bond. If she is a citizen of Mississippi, she has no right to represent the estate.

On this point we cannot add anything to what is so forcibly said by the Supreme Court of Louisiana. Record, page 53–55. The reasoning seems to us conclusive.

See Watson vs. Bondurant, 30 Ann. 3–6.

She has not destroyed the force of her judicial admissions of citizenship under which she has gained advantages.

The Farrar affidavit, it may be observed, was not offered in evidence on the application for a removal, it was used, if at all, on an application (with which plaintiff in error chose to experiment), to see if the party could not obtain a new trial of the order refusing to remove.

THE EXECUTION which issued on the judgment (after Mrs. Bondurant made herself a party to the same) was addressed in the prescribed form of ordinary executions to the *sheriff of the parish of Tensas, Louisiana.*

The State of Louisiana, by this writ (*which the plaintiff in error sued out*), commanded the said sheriff to sell the 160 acres of land in the possession of defendant in error as owner (and which had been also held by his vendor as owner as we have seen ever since 1854) to satisfy *the judgment* against the Bondurants, and to pay the money over to the plaintiff in error. And the sheriff was commanded to make return of the writ to the *Thirteenth Judicial District Court* of Louisiana for the parish of Tensas, in seventy days. See Writ, Record 27–28. The seizure of defendant Watson's land (Lot No. seven, Section 11, T. 11, R. 12 E.) was made under such *express command* of the writ, by the sheriff on the 15th June, 1875. Record, page 28.

Probably under the theory of the plaintiff in error (that as the mortgage of 1852 had the Spanish pact *de non alienando* in it, it was not necessary to make third persons owning the property parties to the suit to bind them), it was deemed to be to the advantage of Mrs. Bondurant to make herself a party to the judgment and execution in the State Court, and in that way enforce, if possible, the judgment against the owner and third possessor, Frank Watson.

Her counsel well knew that if Watson should fail in the injunction she would have a summary remedy against him and his sureties, under the State law, for heavy damages and interest. These damages Mrs. Bondurant eagerly claims before this Court. Appellant's brief in No. 217, page 29. She also, by her seizure, expected to avoid the delay required by the ordinary action of mortgage.

It is true she might have ignored the Bondurant suit, as affecting a third possessor, and have brought an independent original action on her supposed mortgage against Frank Watson, the present owner, at her option in the State Court or United States Court; and had she *obtained a judgment* in such hypothecary action, the officer of the proper Court would have enforced it without let or hindrance from the other jurisdiction. *But that was not her theory of the law.* Through her counsel she held that A. C. Watson and his vendee, Frank Watson, were bound by the action *via ordinaria* and judgment against the Bondurants. What we have just said will the better appear from the following provisions of the Louisiana law:

"Section 1754. On the trial of injunctions, *the surety on the bond* shall be considered as a party plaintiff in the suit; and, in case the injunction be dissolved, the Court, in the same judgment, *shall condemn the plaintiff and surety*, jointly and severally, to pay the defendant's *interest* at the rate of *eight* per cent. per annum on the amount of the judgment, and not more than *twenty per cent. as damages*, unless damages to a greater amount be proved, *and the sureties, in such cases, shall not be allowed to avail themselves of the plea of discussion.*"

"Section 1755. *If a third person shall obtain an injunction to arrest the execution of a judgment between other parties, and it shall be dissolved, the plaintiff in injunction and his security* shall stand in the *same situation*, and be subject *to all the responsi-*

bilities and penalties imposed by the preceding section on the plaintiff and his security; and a similar judgment may be given against them on the dissolution of the injunction."

Revised Statutes, 1870, p. 349, secs. 1754, 1755.

Dorsey vs. Vaughn, 5 Ann. 155.

Stewart vs. Robinson, 24 Ann. 182.

We have seen that plaintiff in error had resorted to the ordinary action, and, according to the authorities, was, notwithstanding the opinion of her counsel, bound to that mode of proceeding.

See authorities cited by Supreme Court of Louisiana in this case. Record, page 58, margin 136.

Desobry & Sons vs. Carmena, 9 Ann. 180.

This principle of our law is only in accord with the commonest principles of justice.

"A sentence of a Court pronounced against a party without hearing or giving an opportunity to be heard, is not a judicial determination of his right, *is not entitled to respect* in any other tribunal."

Windsor vs. McVeigh, 93 U. S. Rep. 277.

Earle vs. McVeigh, 91 U. S. Rep. 507.

"If the mortgagee, instead of proceeding *via executiva in rem* against the property, elects to sue his debtor *in personam*, and to attempt to enforce his judgment *via ordinaria*, the pact *de non alienando will not enable him to seize the mortgaged property in the hands of a third possessor claiming the ownership.* He must exhaust his remedy against the property subject to seizure under *the writ of fieri facias;* and failing to obtain satisfaction by this means, he can reach the mortgaged property *only by an action*, the regular hypothecary action of our law against the third possessor."

Watson vs. Bondurant, 30 Ann., pages 10–11.

Articles 68, 69, 70 and 71 C. P. explain fully what the hypothecary action is.

See last paragraph in Page vs. Generes, 6 Ann. 551.

De Gruy's Syndic vs. Hennen, 2 L. R. 547.

Succession of Jesse C. Patrick, 25 Ann. 154.

Hall & Lile vs. Belden, 29 Ann. 118.

It is thus very clear that the seizure of the complainant's property without any judgment against him under the pretence that they had a judgment against the Bondurants, was *an unwarranted proceeding*, which was rightfully enjoyed.

Being an ordinary action, all parties to be affected by the decree should have been made parties. Waldo & Hughes vs. Angamar, 12 Ann. 74. Rightor vs. Lizardi, 4 Ann. 260; Reynolds, Byrne & Co. vs. Feliciana Steamboat Co., 17 L. R. 405.

The Code of Practice in the following articles has expressly provided the mode to be pursued *in the ordinary action*, the only mode to bind a third person by the ordinary action.

"Article 68. If the hypothecated property be *neither in the possession of the debtor nor his heirs*, but in that of *a third person*, the creditor has HIS ACTION against that person in order to compel him either to give up the property, or pay the amount for which it stands hypothecated. This is the hypothecary action, properly speaking."

"Article 69. If thirty days after the amicable demand, made from the debtor or his heirs of the payment of an hypothecary debt, it has not been fully discharged, the creditors *may bring his action against the third possessor* of the property hypothecated to him *to have it seized and sold*, if that third possessor have not within *ten days after having been notified* of such a demand, paid the amount of the hypothecary debt, including the interest and costs."

"Article 70. But the creditor who brings this action must declare on oath in the petition, that the debt for which he demands the seizure of the hypothecated property is really due to him, and that *he has in vain demanded payment* from his debtor *thirty days previous to his bringing his suit*."

"Article 71. Nevertheless, if the third possessor against whom the action is brought, be not personally bound for the payment of the debt, he may oppose the sale of the hypothecated property if there be other hypothecated property in the possession of the original debtor *and require its previous discussion*, pending which the proceedings as to the sale of the property shall be staid."

See Gentis vs. Blasco, 15 Ann. 104.

In the same direction the Civil Code, Art. 3404 (3366, Code 1825), says:

"The third possessor who is *not personally liable* for the debt, may, notwithstanding, within ten days from his being served with an order of seizure, oppose the sale of the property mortgaged which is in his possession, if he has good cause to show in support of such opposition, as *that the mortgage has not been registered, or other plea*, or if there is other property mortgaged for the same debt within the possession of the principal debtor or debtors, in which last case the possessor may demand that his property be previously discussed, in form directed under the title, *Of Suretyship*, and during the discussion the sale of the property mortgaged, and in the possession of the third person shall be suspended." This last article, however, refers to the executory process.

And the Code of Practice in this case has expressly provided the injunction as a remedy.

"Article 298. The injunction must be granted and directed against the defendant himself in the following cases." * * * * * * * *

7. When a sheriff, in execution of a judgment, has seized property not belonging to the defendant and insists on selling the same, disregarding the *opposition* of him who alleges that he is the real owner, or is guilty of any other illegal act in the execution of his office."

* * * * * * * * * *

As the Supreme Court said, in Page vs. Generes, 6 Ann. 551, "The claim under the judicial mortgage, resulting from the recording of the judgment, might be dismissed with the single remark that the defendant has not proceeded by the hypothecary action, and he has no right to seize mortgaged property in the hands of a third person, as he has attempted to do."

It is thus seen what citations and notices a third possessor is entitled to *via ordinaria*, and which Mrs. Bondurant *was bound to follow*, having instituted a suit *via ordinaria*. It is also seen, that Watson also proceeded in exact conformity with the requirements of the Code of Practice and Civil Code, both as to the Court and the form of proceeding. Cobb vs. Richardson Sheriff, 30 Ann. 1230.

It is, therefore, very clear that the choice of jurisdiction made by Mrs. Bondurant *was entirely voluntary on her part*, and having placed Watson's property, by her voluntary action, *in the custody of the Sheriff, a State officer*, for whom the law has made no other provision for the return of his writ, than to return the same to his own Court, we think she has no reason to complain, if we apply to the same Court to construe its own decree, and to correct any irregularities in the proceedings. How can she compel us to ask *the Courts* of the United States to countermand the writ of the State Court *which she herself placed* in the hands of the State officer, and which commands him to make a return to the State Court?

Having the right, the defendant in error filed his petition in the State Court, to have the Bondurant judgment in effect, declared void and inoperative as to him and to restrain the sheriff from selling his property in that irregular manner under a judgment, to which he was not a party, and on a claim upon which he was in no wise bound. Appellant and plaintiff in error in his brief calls our petition for an injunction, a third opposition. The Code of Practice defines a third opposition as follows: Art. 395. "This opposition is a demand," (that is, proceeding) "brought by a third person not originally a party in the suit for the purpose of arresting the execution of an order of seizure or judgment rendered in such suit, or to regulate the effect of such seizure in what relates to him."

Whether we consider the injunction under the head of petition or a third opposition, it is part of the original suit. C. P., Art. 617. The execution of judgments "belongs to the Courts, by which the causes have been tried in the first instances, whether such judgments have been affirmed or reversed on appeal."

Dufossat vs. Behrens, 18 Ann. 339. No other Court in general has a right to injoin a judgment. Cobb vs. Richardson, 30. A. 1230.

The injunction is only ancillary to the original suit. The Court so held in Rowlett vs. Sheperd, 4 L. R. 90.

Gwin vs. Breedlove, 2 Howard R. 29–35.
Freeman vs. Howe, 24 H. 460, No. II.
Buck vs. Colbeth, 3 Wal. 241.
Dunn vs. Clark, 8 Peters, 1.

It is not such an original proceeding as to be removable into the Courts of the United States.

Bank vs. Turnbull, 16 Wallace, 195.

This Court said, in this last mentioned case:

"Conceding it to be a suit, and not essentially a motion, we think it was *merely auxiliary* to the original action—*a graft upon it*—and not an independent and separate litigation. A judgment had been recovered in *the original suit, final process was levied upon the property in question to satisfy it, the property was claimed by Turnbull & Co., and this proceeding, authorized by the laws of Virginia, was resorted to, to settle the question whether the property ought to be so applied.* The contest could not have arisen but for the *judgment* and *execution,* and the *satisfaction of the former* would at once have extinguished the controversy between the parties. The *proceeding* was necessarily instituted *in the Court where the judgment was rendered,* and whence the execution issued. No other Court, according to the statute, could have taken jurisdiction. It was provided to enable the Court to determined whether its process had, as was claimed, been misapplied, and what right and justice required should be done touching the property in the hands of its officer. It was intended to enable the Court, the plaintiff in the original action, and the claimant, to reach the final and proper result by a process at once, speedy, informal and inexpensive. *That it was only auxiliary and incidental to the original suit is, we think, too clear to require discussion.*"

In another case this Court said:

"We think that the Circuit Court was clearly right in its action. The *filing of the additional paragraphs did not make a new suit within the meaning of the Judiciary Act.* They were in the nature of defensive pleas, *coupled with a prayer for injunction and general relief.* This, if allowed by the Code of Indiana, might give them, in *some sense*, the character of an original suit, but *not such* as could be removed from the jurisdiction of the State Court. The *right of removal is given only to a defendant who has not submitted himself to that jurisdiction; not to an original plaintiff in a State Court*, who, *by resorting to that jurisdiction, has become liable, under the State laws, to a cross-action.*" * * *

"It is equally fatal to the supposed right of removal that the record presents *only a fragment of a cause*, unintelligible except by reference to other matters not sent up from the State Court, and through explanations of counsel. A suit removable from a State Court must be a suit *regularly commenced* by a citizen of the State in which the suit is brought, by process served upon a defendant who is a citizen of another State, and *who, if he does not elect to remove, is bound to submit to the jurisdiction of the State Court.*"

West vs. Aurora City, 6 Wal. 141–2.

It may perhaps be proper to repeat, what we have already intimated, that in the application for a removal the plaintiff in error does not stand in a very favorable attitude, *for if she was not a citizen of Louisiana, she* *committed a fraud upon the Courts by taking out letters of executorship under the pretence that she was one.*

V.

The act of Congress prohibits the Courts of the United States from injoining the State Courts.

See Revised Statutes, section 720, acts 1793.

For eighty-seven years this Court has enforced this law, and there is not one case where it has countenanced the right of the United States Courts to try suits for injunction of State process, or to issue such injunctions. And it seems to us that these decisions are based upon the soundest of reasons, and in themselves are calculated to promote unity and harmony between the judiciary of the two systems.

Take this very case: *the sheriff, a State officer, has taken into his custody* a tract of land which he has been expressly commanded, in the decree itself, to take by an execution issued from a State Court.

The owner of the land has applied to the Court under whose decree the land has been seized, to enjoin its own officer from wrongfully selling the land.

The case has been taken charge of also, by the Circuit Court. Is it not calculated to produce irritation for the Circuit Court to direct the sheriff of the parish of Tensas (an officer in no way amenable to the Circuit Court), how he shall perform his duties to the District Court of that parish? But the Circuit Court *actually dissolved the injunction* which the State Court had granted and perpetuated, November 13th, 1877. Record 217, page 60.

Can the Circuit Court finally command him to disobey the commands of his own Court? How would the Circuit Court deal with him if he should disobey? Will it take him out of his parish by attachment and deprive the State Court of its officer? Will it compel him to pay over the money he makes on the State writ to plaintiff in error, in the Court room of the United States Court? Can it enter satisfaction on the records of the State Courts? Fortunately for the jurisprudence of the United States, this Court we think has settled those questions adversely to Mrs. Bóndurant's pretensions.

This Court has said in Buck vs. Colbeth, 3 Wal. 341, as follows:

The "principle is, that *whenever property has been seized by an officer of the Court, by virtue of its process, the property is to be considered as in the custody of the Court*, and under its control for the time being; *and that no other Court has a right to interfere with that possession, unless it be some Court which may have a direct supervisory control over the Court whose process has first taken possession on some superior jurisdiction in the premises.* This is the principle upon which the decision of this Court rested in Taylor vs. Caryl and Hogan vs. Lucas, both of which assert substantially the same doctrine. *A departure from this rule would lead to the utmost confusion*, and to endless strife between courts of concurrent jurisdiction, deriving their powers from the same source; but how much more disastrous would be the consequences of such a course, in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and subject-matter of the suit."

Buck vs. Colbath, Wall. 341. See, also, Taylor vs. Caryl, 20 Howard, 583.

Hogan vs. Lucas, 10 Peters, 400.

But to return to the statutory prohibition of the Courts of the United States.

It is conceded by plaintiff in error and by us, that the decree in the case of Walter E. Bondurant against John, Horace and Albert Bondurant, expressly described the tract of land held by the defendant as owner, and declares it to be subject to the pretended mortgage of the plaintiff in error.

It is further conceded, that if the plaintiff in error had resorted to the *executory proceeding*, instead of the ordinary action against the same parties (provided his mortgage were valid), and had *actually seized* the property in our hands as owner, under that process, as he has now done on his judgment *via ordinaria*, *the seizure* would not have been invalid for *mere want of a previous* citation. But the *ex parte* executory order would not have all the qualities of a judgment *via ordinaria*.

It would have been without effect as a judgment for the excess of $37,118.50 and interest over Bondurant's bid for $4478.

Mrs. Bondurant contends that the judgment *via ordinaria*, however, binds our property in the same manner that the executory process would have done. That the magic of the cabalistic words of the pact *de non alienando*, without any sort of notice, really and truly makes us a party to the decree *via ordinaria*, and binds our property! We deny that the decree can have that effect, although it has, in words, ordered and decreed our property, in a case where we were not parties, to be sold, and we apply to the Court which rendered the *ex parte* decree to restrain the erroneous language used in the decree, and to annul its effect *so far as we are concerned*. If twelve months had not elapsed, we could have appealed from the decree under the Louisiana law allowing third parties injured by a judgment to appeal. As that time had gone by before we knew that our property had been decreed to be sold, and we have *never been cited*, we can, under the same law, attack the judgment by way of nullity, whenever it is set up against us, or whenever we are prejudiced by it.

"Article 612. *The nullity* of a judgment rendered against a party without his ever having been cited, or by an incompetent judge, even if all the formalities of law have been observed, *may be demanded at any time*, unless the defendant were present in the parish, and yet suffered judgment to be executed without opposing the same." C. P. article 612.

"Article 608. A nullity of judgment may be demanded from the same Court which has rendered the same, or from the Court of appeal before which the appeal from such judgment was taken, pursuant to the provisions hereinafter expressed."

We deny that the judgment can have the effect to condemn our property without ever having given us a hearing.

Our adversaries say that it does bind us without citation or notice; that is the contention between us. We ask the Court which rendered the judgment, and decreed our property to be sold, to restrain the same so far as it affects us.

Our petition denies, as we have seen, that A. C. Watson, who was owner of the property when the Bondurant judgment was rendered, *was ever made a party to the suit*, which was *via ordinaria*, or that any notices as third possessor were served on him. It alleges (what was a valid ground when the petition was filed, 14 Wall. page 10, Palmer vs. Marston), that the judgment was void as against Watson, Sr., petitioner, and third parties, because a large part thereof was the price of slaves. It denied that said plaintiff in error had any mortgage on the property, and prayed that the sheriff and plaintiff in error be injoined, etc., from selling said property under execution.

We have already cited authorities to show that such a proceeding is only ancillary to the original suit, and the main relief sought is an injunction against the execution of a judgment of a State Court condemning our property to be sold.

The express prohibition of the act of 1793, and section 720 U. S. Revised Statutes, would make any argument unnecessary, were it not for the fact, that it will be contended here, as it was in the lower Court, that the act of Congress of 1875 has repealed these acts, especially where the injunction is first sued out in the State Court, and the cause is removed. The argument convinced the lower Court, and it allowed this very case to be removed into the Circuit Court, where ultimately final judgment was also rendered in Watson's favor on the merits. See Watson vs. Bondurant, 2 Woods, 166.

The act of 1793 was a special remedial act upon a single subject, containing a prohibition *to all the Courts* of the United States to prevent the evil of a conflict of jurisdiction.

The act of 3 March, 1875, is a general law as to the general jurisdiction of *one Court*, the Circuit Court, and the removal of causes.

Subsequent general laws do not repeal antecedent special laws. Congress would not give the right to the *Circuit Court* to do what the *Supreme Court* of the United States is still prohibited from doing.

The argument, that the act of 1875 contemplated the removal of *some injunction* suits into the Courts of the

United States, does not invalidate the prohibition for two reasons:

1st. The same act gives *the State Court concurrent jurisdiction* with the Circuit Courts, as all prior acts had done. That power of concurrent jurisdiction must necessarily be a power to superintend the execution of its own judgments, and ought to be as effective in the State as the United States Courts.

2d. The injunction suits contemplated by the statute of 1875 were those where the action had been *originally* commenced by an injunction, and where, by the removal, the whole cause, root and branch, is removed into the Courts of the United States. The same in regard to garnishment process. If it is at the commencement of the action in the place of mesne process, the whole cause with garnishment process is removed. If the garnishment happens to occur in aid of a *fieri facias*, it cannot then be removed.

The provision in the act of 1875, in reference to injunction, is not a new provision. The act of 1866, July 27, 14 Statute, at Large, 307, had this provisions, "And *any injunction* granted before removal of the cause against the defendant applying for the removal, shall continue in force until modified or dissolved by the United States Court to which the cause is removed."

And this provision was carried into the U. S. Revised Statutes, sec. 646, without any one suspecting that it repealed so important an act of Congress as that of 1793, which also finds its place in the Revised

Statutes. If such a repeal had been intended, why did Congress allow the act of 1793 a place in the Revised Statutes? When this Court decided the case of Haines vs. Carpenter, 91 U. S., the act of 1866 had been in force nine or ten years; yet this Court said of the case:

"In the first place, the *great object of the suit is to injoin and stop litigation in the State Courts, and bring all the litigated questions before the Circuit Court. This is one of the things which the Federal Courts are expressly prohibited from doing. By the act of March 2, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a State Court.* This prohibition is repeated in sect. 720 of the Revised Statutes, *and extends to all cases except where otherwise provided by the Bankrupt Law.* This objection alone is sufficient ground for sustaining the demurrer to the bill."

The same doctrine is again reiterated by this Court in Dial vs. Reynolds, 96 U. S. Reports, where the Court said:

"*Such an injunction* (except under the Bankrupt act) *no Court of the United States can grant.*" p. 340.

The case of Diggs vs. Walcott, 4 Cranch, 179, decided seventy-three years ago, is directly in point, it having been removed from a State Court, and it has never been overruled.

See Slaughter House Case, 1 Woods R. 21.

Daly vs. Sheriff, 1 Wood, 175.

Also, Watson vs. Jones, 13 Wall. 679.

Evans vs. Pack, 7 Central Law Journal, p. 409, November 22, 1878, decided by Judge Brown.

VI.

Again: the State Court was seized of the jurisdiction over the thing by virtue of a judgment which the Circuit Court was without jurisdiction to revise, amend or modify, and a writ of execution issued under such judgment at the instance of Mrs. Bondurant herself. *She demanded the execution from the State Court.*

The judgment was rendered by a Court which had complete jurisdiction to try the case and render the judgment erroneous, though it was as to third persons.

This jurisdiction had been given to the Court by the ancestor of the plaintiff, who brought his suit in the State Court in preference to the Circuit Court of the United States. Under this judgment, which the State Court alone can declare invalid as to the defendant in error, as we have seen, the plaintiff in error issued execution to the sheriff, and caused the property of Frank Watson (because it was described *in the judgment* and in the execution) to be seized by the sheriff, *who, as a State officer, and by virtue of the command of the writ, holds and retains the property.*

It would be an idle thing to command the sheriff to deliver the land to the marshal of the United States, for there could be no warrant of law for him to execute the judgment *of a State Court.* We do not understand our adversaries to go so far as that; they only say that the United States Court, while it has no power to modify the decree in favor of the plaintiff in error, can annul the injunction granted by the State Court, and order the sheriff, a State officer, to sell Watson's property to pay Bondurant's debts, in execution of the judgment of the State Court against the Bondurants.

But it must be evident that the whole argument on the part of Mrs. Bondurant *concedes that the State Court has rightful possession of the thing in virtue of its judgment and execution.*

The authorities, we think, are equally clear that this Court will not in that case allow such jurisdiction to be interfered with—that it will not dictate to a State tribunal, how it shall interpret and execute its own judgments. We will not repeat the quotations on this branch of the case, which we have already made on another.

Buck vs. Colbath, 3 Wallace, 341.

Supervisors vs. Durant, 9 Wallace, 418–19.

Taylor vs. Caryl, 20 H. 591—598. This Court has said:

"We need scarcely remark that no government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its tribunals were suject to the determination of another." Freeman vs. Howe, 24 H. 459.

In whatever light this case be examined, it seems to us very clear, that the case is one not removable into the Circuit Court of the United States.

What is here said on cause No. 216 on the question of removal, will be equally applicable to No. 217.

We now proceed more particularly to the consideration of the case in the United States Courts.

VII.

We have already cited authorities to show that where a party undertakes to obtain a judgment *via ordinaria* on his mortgage, he cannot enforce the same against third possessors without pursuing the formalities and giving the notices, and serving the citations required by the law. It is therefore clear, that the injunction was properly sued out against the unlawful and unwarranted seizure of Watson's property on a judgment, to which he had never been made a party.

In addition to the cases already cited, we may add the following, viz: Dumonchel vs. Limerick, 21 Ann., 30–32. In this case the defendant *in the executory* process injoined; the plaintiff in the executory process in his answer to the suit for injunction changed the suit into an ordinary action, by *reconvening* in his answer. The Court said: "His answer virtually admits, that his executory proceeding was wrong. If so, the injunction was properly taken out."

Such a change also releases the sureties on the injunction bond. Walker vs. Ducros, 22 Ann. 214? See also Jennings vs. Grigsby, 12 Ann. 642.

Much has been said by the appellant's counsel about the old Spanish pact *de non alienando*, as though there was something magical in this barbarous Latin expression which would overthrow the decisions of the Supreme Court and enable a man to get a valid judgment against another without his knowing it.

As we do not in this place propose to recapitulate what we have said elsewhere, we will simply say, that the formidable pact is a simple agreement by the mortgagor that he will not sell or encumber the property to the prejudice of the mortgagee. In Spanish times, when the few notaries public kept all the titles to real estate and there was no registry elsewhere, it was a sufficient notice, perhaps, for that system. But while all *written contracts have equal validity* in ordinary affairs, a valid recorded mortgage by private act containing the pact *de non alienando* possesses no additional validity, because the holder of such a mortgage would be compelled to bring an ordinary suit to enforce his mortgage.

But in Louisiana there are no covenants running with the land, and in New Orleans, where near two-thirds of the taxable property of the State exists, the pact is never recorded, as was shown in the case of A. C. Watson vs. Bondurant.

Again, the Spanish law on the subject was repealed in 1828, as well as by the Code of Practice, and was only retained by the inattention of the judges until it became too firmly fixed, as it respected the executory process to be overruled.

The absurdity of the anomaly accounts for the reason why the Courts limit it to the executory process.

VIII.

Appellant contends that the CIRCUIT COURT had jurisdiction to try the case, and that the Court erred in deciding the case finally against Mrs. Bondurant in Watson's favor. We propose to show that the Circuit Court, on its own hypothesis of jurisdiction, did not err in its view of the facts of the case on its merits. *No other decree could have been rendered by that Court.*

The point just made, No. VII, applies equally to the case in the Circuit Court (on the improbable supposition it had jurisdiction) as to the State Court.

The only matters we propose now to consider are the two grounds set up in the supplemental bill filed 15th November, 1877, *with a protestando* in support of the jurisdiction of the State Court.

Before making these points, we will briefly recapitulate some and refer to others of the facts, in order to show more clearly, if possible, the points we wish to call to the attention of the Court.

We have seen that the suit of Watson for an injunction was commenced on the 28th day of June, 1875, in the State Court. No. 216, page 1; No. 217, page 5.

The record in the Circuit Court, No. 217, is imperfect.

The counsel for plaintiff in error directed the clerk to send up only parts of the Record X annexed to the supplemental bill (see Record 217, pages 173–174), which instructions have been followed. The exhibit X contained the whole Bondurant case in its order, to the final execution enjoined, and we are obliged to show the old record by piece-meal.

The petition filed January, 1866, is found on pages 65–66, Record 217. It is an ordinary suit, and the prayer is for a citation to JOHN, ALBERT and HORACE BONDURANT. Page 66, Record 217.

The citations are in due form, and follow pages 67 and 68.

The answer of the Bondurants is found on pages 69 and 70.

The judgment in the same case is page 35, of Record 217.

This judgment plaintiff in error contends, covers the lot of land No. 7 in controversy. W. E. Bondurant bought the plantation and all the property, so far as the sheriff could make title, for $4478. Record No. 216, pages 23 and 24, 2239 acres.

This plantation was appraised at $24,000.

The deed from John and Mary Bondurant to A. C. Watson, Senior, for $5775, dated 30th November, 1854, and duly recorded, will be found on pages 77 and 78, No. 217.

After the death of Walter E. Bondurant, the plaintiff in error moved her residence to Louisiana, as we have seen.

The Louisiana estate was appraised at $30,062.

Page 62. If Mrs. Bondurant was domiciled in Mississippi at that time, she would have been obliged to give a bond as executrix, of say, $37,000. It was, therefore, of great moment to her to change her residence, which we contend she did. She, therefore, in applying for letters, etc., declared her domicil to be Louisaina. Record 217, pages 20–21. She describes herself as widow of Walter E. Bondurant, late of Natchez, State of Mississippi: "*petitioner, now residing in New Orleans*, in this State." See No. 216, page 9. On this petition she was only required to take an oath in the same manner that any other Louisiana executor would do. No. 216, pages 9–10. She has lived in New Orleans ever since, as we understand. She was sworn in Tensas parish, page 12, No. 216.

June 15th, 1875, Mrs. Bondurant, by *an ex parte order*, obtained permission to issue execution on the old Bondurant judgment. No. 216, page 26; Order, page 27.

The execution issued as we have seen in the State case, *at her instance*, commanding the sheriff to seize the Watson tract of land by its description in the land office. See the *fieri facias*, pages 27 and 28. Record 217, pages 1 to 4.

The sheriff seized the land in dispute. No. 216, page 28. *Notices* were attempted to be served on the Bondurants, pages 29–30, No. 216, No. 217, page 4.

Under the alias *fi. fa.* the sheriff placed John H. Bondurant on the land as custodian, No. 216, page 30, on the 17th day of June, 1875. No. 217, page 4.

The defendant in error and appellee, on the 26th day of June, 1875, obtained an injunction from the judge of the Thirteenth *Judicial* District Court of the State of Louisiana, having jurisdiction over the case, restraining the sheriff and Mrs. Bondurant from enforcing the judgment and decree against him. No. 216, pages 1, 2 and 3. Petition and order, Record 217, pages 5–9.

Petition of removal, October 18, 1875, is found on page 5 of No. 216, page 11 of No. 217. The State Court refused the order October 19, 1875. No. 217, page 15. The plaintiff in error, we have just said, filed certain of the papers in the Circuit Court. Watson opposed the transfer, but the Circuit Court maintained jurisdiction.

Case No. 217 was by order of the Court transferred to the chancery docket, page 36. Judge Billings *dissolved* the preliminary injunction granted by the State Court, November 13, 1877, page 60.

Mrs. Bondurant *never* having re-inscribed her mortgage after September, 1865, the same, under the settled jurisprudence of Louisiana, was perempted a *second time*, twenty-five years after it was made *and it ceased to exist*, and the mortgage was cancelled on the record according to the well settled law. SEE CERTIFICATE OF MORTGAGE, *page 49;* CANCELLATION, page 153. The judgment of the Supreme Court of the State had been rendered on the 16th day of April, 1877, and no writ of error having been taken out, defendant in error filed, under protest, a supplemental bill, as already seen, in aid of the jurisdiction of the State Court, page 60–63, filed November 15, 1877, ten *years* and one day after Bondurant judgment had been rendered. Whether the Bondurant judgment had become prescribed or not, is a question which does not concern Frank Watson. It was not re-inscribed as a judicial mortgage against the BONDURANTS, and was without influence as *to all persons not named as defendants.* Taylor vs. Hotchkiss, 2 A. 917; Graves vs. Hunter, 23 A. 132.

This second peremption of the mortgage before the supplemented bill was filed, relieves the case from all embarrassment in reference to questions of *vis major*, *etc.*

The *last* inscription of the Bondurant mortgage, we repeat, was made September 8, 1865. It has never been reinscribed from that day to this, as shown by the cancellation and certificate of mortgages No. 217, page 49, page 156. After twelve years and two months had elapsed from that date the supplemental bill was filed, setting up, after the judgment of the Supreme Court, the objection of the want of reinscription a second time, No. 217, pages 61 to 63.

On a final hearing of *the whole case*, Judge Billings, reinstated the injunction of the State Court, and made the same perpetual and condemned Watson to pay half the cost. *Two injunctions* of two separate jurisdictions, therefore, efficiently tie the hands of the Sheriff. A singular condition of things existed from November 13, 1877, to June 17, 1878. The Circuit Court had dissolved the injunction which the Supreme Court of Louisiana had made perpetual! Rec. No. 217, pages 60 and 171.

As both judgments are now in our favor, we feel somewhat *embarrassed* by the case in the Circuit Court as it stands. The first error of the Circuit Court was committed, we think, by taking jurisdiction which was strenuously contested by us. This Court might dismiss the whole case from the Circuit Court, perhaps, at the costs of appellant. *The Circuit Court was without jurisdiction; all the costs were made against our will*, and we were forced to defend ourselves as best we could in that Court. There cannot, therefore, be any ground for taxing us with costs of proceedings which we strenuously opposed.

There are various matters in the record which it is not now necessary to notice; as for example: the attempt to enjoin counsel and attach them for contempt of Court.

From this state of the facts it has become apparent, there remain only two questions to be considered, viz:

1st. What effect had the judgment of the Supreme Court of the State after it had, at the instance of Mrs. Bondurant, reversed the judgment of the District Court as to damages and affirmed it as to the land?

2d. What effect had the second peremption of the mortgage?

First.

It is clear that the judgment of the Supreme Court of Louisiana *was binding on Watson.* Mrs. Bondurant, by appealing from the District to the Supreme Court of Louisiana, had, it has been seen, obtained a reversal of the judgment of the District Court, so far as to relieve her from *damages* for the wrongful seizure on the purely technical ground, that the question of damages ought to have been submitted to a jury. Of course Watson was condemned to pay the costs of appeal. Decree, Record No. 217, page 96.

Now it is also clear *that Mrs. Bondurant was not obliged to take a writ of error* from the decree of the Supreme Court of Louisiana, and no such writ has *really* been taken from the decree, as we have seen from that day to this. No attempt even was made to take a writ of error until after the supplemental bill was filed, setting up the State decree as *res judicata* and a bar. Supplemental Bill filed November 15, 1877, p. 63. Pretended writ of error filed December 15, 1877. Admission in answer, No. 217, page 106.

As it was entirely optional with Mrs. Bondurant, whether she would take a writ of error from the decree of the Supreme Court of Louisiana or not, the same cannot, so long as it stands unreversed, be treated as a nullity. In truth and in fact, being seized of jurisdiction, the judgment is *res judicata*, and there is no power any where to reverse the same.

In every paper filed by Watson in the Circuit Court a protest was made, and the jurisdiction of the State Court insisted upon.

So on the trial of the issue on the supplemental bill, Watson insisted on confining the issue to the question of *res judicata*, resting on the force of the decree of the Supreme Court. See Watson's motion to suppress testimony, Record No. 217, page 168.

"So long as this judgment remains in force, it is itself evidence of the right of the plaintiff to the thing adjudged and gives him a right to process to execute the judgment. The errors of the Court, however apparent, can only be examined by an appellate power," &c. Voorhees vs. Bank of United States, 10 Peters, 473.

As no person but Mrs. Bondurant could cause a review of the decision of the Supreme Court, nothing is more reasonable *than to hold her bound by the decree which she obtained*, and which she alone (if reversable) could cause to be reversed. Bank of North America vs. Wheeler, 28 Conn. 433.

Nicholl vs. Mason & Spaulding, 21 Wendell, 339.

Scott vs. Bogart, 14 Ann. 262–3.

"It is the rule that a definitive judgment of a Court of another State between the same parties, upon the the same cause of action upon the merits of a case, is conclusive. But it must be a definitive judgment only on the merits. (Walsh vs. Durkee, 12 J. R. 99; Laurie vs. Westcott, 26 N. Y 146)."

Brinkly vs. Brinkly, 50 N. Y. 232.

"This is the rule prevailing in regard to suits prosecuted in different States at the same time. The pendency of the one first commenced cannot be pleaded in abatement to another subsequently prosecuted in another State; *but a judgment in either, without reference to the question as to which was commenced first, may be pleaded* in bar to the other."

United States vs. Dewey, 6 Bissell, 503.

"The adjudication of the appellate Court constitutes the law of the case upon the points adjudged, and is binding upon the Circuit Court and every other Court, when brought before it for consideration. The *Circuit Court* possesses *no revisory power* over the decisions of the Supreme Court of the State, and any argument to show that the Court mistook the law, and misjudged the jurisdictional fact, would have been out of place."

"There were no facts before the Circuit which were not before the Supreme Court of the State when its judgment was pronounced."

Galpin vs. Page, 18 Wall. 365.

As a writ of error alone would enable this Court to review the decision of the Supreme Court of the State on Mrs. Bondurant's appeal, so that judgment was binding on the party procuring it, as well as the appellee, until the same should be reversed. There does not seem to us any other reasonable manner of treating the question.

See also Bouvier's Institutes, page 376, section 3105, edition 1854.

See also William Gorman's case, 124 Mass. Reports, 190.

SECOND.

On the question of mortgage: we understand it to be the settled law of this Court, that on all questions of title and mortgage, the State law, as expounded by the Supreme Court of the respective States, controls. And that there is not one system of laws, as to land, for citizens of the same State, and another system for citizens of other States.

"It is a principle too firmly established to admit dispute at this day, that to the law of the State in which land is situated, must we look for the rules which govern *its descent*, alienation and transfer, and the effect and construction of conveyances."

McGoon vs. Scales, 91 Wall. 23, re-affirmed Brime vs. Insurance Company, 96 U. S. Rep. 636.

The case of the Howe Machine Company vs. Gayle, decided by this Court last May, and not yet reported, was as to a license to peddlers. This Court said, through Mr. Justice Swayne as its organ, in regard to the decision of the State Court, "We are bound to regard this construction as correct, and give it the same effect *as if it were a part of the statute.*"

Reporter, June 10th, 1880, page 769.

And the law is the same as TO MORTGAGES. In a recent case this Court said: "The question depends upon the recording acts of the State of Connecticut, *and we* *are bound to follow the decisions of the Courts* of the State in their construction of those acts, if there be a uniform course of decisions respecting them. Allen vs. Massey, 17 Wall. 354; Swift vs. Tyson, 16 Peters, 1; Chicago City vs. Robbins, 2 Black. 428."

Townsend vs. Todd, 91 U. S. Reports, 422.

U. S. Revised Statutes, section 721.

See Mitchell vs. Lippincott & Co , 5 Woods, pages 472, 437, where the authorities are collated by Mr. Justice Woods, and the same conclusion reached as in Townsend vs. Todd.

Under the Louisiana decisions, there can be no question but that the pretended mortgage has been PEREMPTED ONCE, IF NOT TWICE OVER, and that it has ceased to exist, and has been cancelled on the records by the proper authority.

Before calling the attention of the Court to the long list of authorities on this point, we will briefly advert to one or two of the grounds on which the appellant's counsel seems to think that this long current of decisions may be avoided.

1st. He says that the want of registry cannot be pleaded by the parties to the contract of *mortgage*, their heirs or assigns, and cites article 2442 of Code of 1870, Code 1825, art. 2417. This would leave the impression that the transferees of *mortgaged* property are bound by the unrecorded *mortgage* given by the mortgagor. The article cited is under the head of *sale*, and has never been so understood. The Supreme Court has said:

"In relation to third persons, the act of sale not recorded is considered as void."

Gravier vs. Baron, 4 L. R. 241.

See also Brosnaham vs. Turner, 16 L. R. 454.

The same Code from which the learned counsel quotes, article 2442, was amended by incorporating the Statutes of 1810, 1855 and 1879 therein; and one would think it sufficiently clear. After saying that "no notarial act concerning immovables shall have any effect against third persons, until the same shall have been deposited in the office of the parish recorder, or register of conveyances, of the parish where the immovable property is situated," and directing how it is to be done (arts. 2264, 2265), the Civil Code of 1870, art. 2265, says:

"All sales, contracts and judgments affecting immovable property, *which shall not be so recorded, shall be utterly null and void, except between the parties thereto.*"

* * * * * * * * * *

Meyer & Bro. vs. Simpson, 21 Ann. 591.

Doughty vs. The Sheriff, 25 Ann. 290.

2d. It is pretended that the *discontinued* ejectment suit brought against A. C. Watson, Senior, for the *land*, has the effect of *res judicata* against A. C. Watson, Sr., and his son Frank, so far as to conclude them and prevent their showing *a peremption of a mortgage* on the same property. We are obliged to confess that our obtuseness does not permit us to see the force of the proposition.

3d. It is contended also by appellant's counsel that the original mortgage was merged in the judgment of the Bondurants. As we were not a party to that judgment, it cannot affect us prejudicially, and we shall content ourselves by a reference, in the proper place, to the authorities applicable to this case.

It may facilitate the understanding of our argument, if we explain how we understand the law in regard to mortgages. It is briefly this: As between a mortgagor and mortgagee, the latter and his assigns may enforce the mortgage against the mortgagor, so long as *the debt* is not prescribed, or the property otherwise encumbered. If the mortgage has been recorded, and not re-recorded within ten years, then the mortgage *debtor*, or any person having an interest, may have the mortgage cancelled, for it has ceased to exist on the public records so as to affect third persons, and since the mortgagor has the express right to cancel the mortgage, it would seem that he might do so whenever his interest required it. The mortgage creditor may, so long as *the debt* is not prescribed, inscribe his mortgage at any time after the ten years, and then, instead of relating back to the original date of the first inscription, it takes effect as a *new* mortgage from the date of the registry. Taylor vs. Ealer, 22 A. 278; 31 Ann. 48; 27 Ann. 630. For a *sale*, it is sufficient to deposit the act with the recorder; for a *mortgage*, the *mortgagee* is bound to see that the deed is actually inscribed on the mortgage records. We think the above will explain all the decisions which are so contradictory to our adversaries, and will show that they are harmonious. The contract may exist without being recorded. The *contract* or *debt* may become *prescribed*.

The *mortgage*, so far as third persons are concerned, only exists by virtue of the registration. If not re-inscribed in ten years, it ceases to exist: it is *perempted*, and dead.

To bring the DATES again directly under the eye for this point, we reproduce them.

The supposed mortgage was recorded in the registry of mortgages December 6th, 1852.

It was not reinscribed until September 8th, 1865, nearly *thirteen years*. IT NEVER HAS BEEN REINSCRIBED SINCE.

The war ended as to Louisiana in April, 1866.

The judgment in favor of Walter E. Bondurant against Albert Bondurant, Horace Bondurant and John Bondurant was rendered 14th November, 1867, and was recorded the *same day* as a *judicial mortgage*, November 14th, 1867.

This judicial mortgage could of course, as we have seen, bind nobody but the persons named in the decree, viz.: Albert, Horace and John Bondurant. *It could not bind third persons.* 6 Ann. 551, already cited.

Ten years and *one* day after this judicial mortgage had been recorded, and twelve years, two months and seven days after the reinscription of the pretended mortgage, viz.: on the 15th day of November, 1877, Frank Watson filed his supplemental bill, setting up the peremption of the mortgage by a second neglect of re-inscription within ten years. Record 217, pages 60, 63.

On the 3d day of January, 1877, the pretended mortgage in favor of Walter E. Bondurant was *rightfully cancelled by the recorder of mortgages. The cancellation* was written on the margin, but appears at the end of the act of supposed mortgage. Record 217, pages 153–156. See certificate, page 49. The *actual* erasure of the mortgage is of no consequence. It is extinct by the lapse of time. Gravier, Curator, vs. Hodge, 14 L. R. 101.

In order to avoid all discussion of questions of *vis major*, we shall, without waiving the point, confine ourselves, as already proposed, to the discussion of the question of the second peremption of the mortgage. It is free from all difficulty, and shows another valid ground, if it were needed, for the judgment of the Circuit Court.

The recording of a mortgage is not, in Louisiana, a judicial act. Like the protesting of a promissory note or bill of exchange, to charge indorser, *the holder must himself* see that the act is done.

C. C. 3220 (Code 1825, law of the case.) "If, on the other hand, the creditor allows the time to elapse without causing the act or judgment to be recorded, his mortgage shall have effect against third persons only from the day when he shall cause the inscription to be made."

"*But this inscription he may have made at any time, without having recourse to a court of justice*, or presenting an authentic copy of the act or mortgage."

The Louisiana law in regard to reinscription was passed in order that recorders of mortgages should not be compelled to examine the records further back than ten years.

In Louisiana, as to third persons, *registry is the mortgage*. The law does not permit the mortgage to *survive*, without reinscription, longer than ten years.

"C. C. 3333 (Code 1825). The *registry preserves* the evidence of mortgages and privileges during *ten* years from the day of their date. *Their effect ceases*, even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time, in the manner in which they were first made."

"But this rule does not take place with regard to mortgages to which *husbands* are subjected for dower and other claims of *wives*, and *tutors*, and *curators* towards *minors*, interdicted and absent persons whose estates they administer."

The *destruction* of the right of mortgage *for want of reinscription* within ten years is a different thing in the civil law from prescription or limitation of actions.

Zachariæ says: "Every inscription" (of mortgages) "*perishes* (se perime) or loses its force when it is not renewed in the ten years, to count from its date."

I. Zachariæ, page 265, sec. 280. Brussels Ed.

Peremption.—Laurent (Ed. 1878) says: "If the creditor renew the inscription in the delay of fifteen years" (formerly ten) "*he preserves* his mortgage or his privilege with the rank and the rights which the first inscription gave him: nothing in his situation is changed: his rights remain intact: he preserves them as if the first inscription continued to produce all its effects. *Nevertheless, the second inscription, like the first, has only a temporary effect.* Its effect ceases at *the expiration of the second period of fifteen years.* The creditors ought to take care to renew the inscription before that delay has expired. He can also, in successively renewing the inscription, perpetuate its effects; that is to say, that he preserves all the rights attached to the inscription so long as the mortgage or privilege shall exist." 31 vol. Laurent, p. 103, No. 4, sec. 120.

Ibid. "*If the inscription is not renewed*, its effect ceases, says art. 90 (Code Civil, art. 2154). In that case, we say the inscription is extinguished (perempted). The expression" (Laurent continues) "energetically denotes that the inscription not renewed is considered as never having been made. Then the mortgage or privileged creditor finds himself in the situation in which he would have been, if an inscription had not been made." 31 Laurent, page 104, sec. 121.

Art. 2154 of the French code is in these words: "The inscriptions preserve the mortgage and privilege during ten years, counting from their date. Their effect ceases if the inscriptions have not been renewed before the expiration of the delay." Although this provision of law is much less rigorous towards the creditor than our code, it is construed very much as our code reads.

Rogron says, under art. 2154, "the reinscription has been required, because, if the *inscription* had lasted as long as the *action*, which, interrupted by *minority* and *citations* in court, could be indefinitely prolonged, it would become impossible for the register of mortgages to find it in a multitude of records which he would be obliged always to keep in order to give a certificate of mortgages."

So, Troplong cites a case as an example.

"Mr. Lecannus created a rent charge in favor of Madame Dumont, secured by a mortgage. Madame Dumont registered her mortgage March 2, 1812. On the 20th of August, a sale was made of the mortgaged property to Madame Bournissien, who had her title recorded on the 1st of September. On the 28th January,1815, Madame Dumont transferred her recorded right to Mr. Capron. This last reinscribed his mortgage several days after the expiration of ten years, viz.: 25th March, 1822. Madame Bournissien contended that the reinscription having been made after the *peremption* of the inscription, the mortgage ceased, in respect to her, to encumber the property. Judgment was rendered in conformity to her view. On appeal, the Court of Rouen (February 1st, 1825) confirmed the decree." * * * * * *

"It might be objected that Madame Bournissien had received the real estate charged with a registered mortgage at the time of the recording of her title; that the mortgage having been impressed on the land and the right of mortgage having been preserved at the time of the registry of the act of sale, the *peremption* of the inscription ought only to occasion a loss in the rank of the mortgage, but ought not to affect the right of enforcing the mortgage. But the reply seems to me to be sufficient, that the right of enforcing the mortgage was subordinate to the registry, which preserved it, and when it became *dead*, it had necessarily drawn after it the right of enforcing the mortgage which was bound to its fortune and its existence. The question has been decided a second time the same way, by a decree of the Court of Cassation (15th December, 1829), in the case where Mr. Wisher (registered on the fifteenth of the recording of the sale) had only renewed the registry of his mortgage after it had already been perempted." Trop. des Privilèges et Hypothèques, No. 716 (bis.)

"But let us take care that we proceed according to the spirit of the law regarding the effect of registry, and not of the hypothecary right in itself. The *inscription* not renewed in the delay fixed by the law, ceases to have effect, as our article (2154 French Code) says: it is *perempted*, and moreover, it cannot avail the creditor any more than if it never had existence." Paul Pont. Hypothèque, No. 1035.

"Inscription in the office of the Recorder of mortgages ceases to be evidence of a mortgage after the lapse of ten years *and it is not subject to the rules of prescription.*" Syllabus. Kohn vs. McHatton, 20 Ann. 223.

"Inscription ceases to be evidence of the mortgage after the lapse of ten years, *and is not subject to the rules of prescription*, but it can be removed by the act of the creditor. 2 A. 109." Bronson vs. Haynes, 19 Ann. 133.

"But it was the act of 1859, which put the mortgage on the property, and we do not find that this act has ever been reinscribed. It is true it is referred to in the act of 1860, and in the act of 1866, but we do not think that the mere recital of an act of mortgage in a subsequent act, acknowledging the obligations contained in the first act, *as to third parties at least*, operates the reinscription of the first act. The subsequent acknowledgment may be sufficient to interrupt prescription *as to debt*, but it does *not reinscribe the mortgage* which secured it, and it is the question of *the peremption* of the mortgage—not the debt—which is in controversy here. We think the opponent's mortgage, created in 1859, expired in 1869, and that plaintiff's mortgage having been in existence at the time of the sheriff's sale he had a right to retain the purchase money, up to the amount of his debt, and that the title to the property should have been made to him."

Blair & Co. vs. Taylor, 25 Ann. 148.

After having thus shown that the *peremption* of a mortgage differs from the *prescription* of actions, the reason why the pendency of a suit to enforce the mortgage itself is not the equivalent of re-inscription, will seem more reasonable to the Court.

For it is well settled by an uniform current of decisions of Louisiana, **THAT THE PENDENCY OF A SUIT TO ENFORCE THE MORTGAGE IN QUESTION WILL NOT DISPENSE THE MORTGAGEE WITH THE NECESSITY OF RE-INSCRIPTION OF THE MORTGAGE AS AGAINST ANY OTHER PERSON THAN THE MORTGAGOR.**

This principle, so firmly fixed and settled in the jurisprudence of Louisiana, furnishes another clear and solid ground for the decree of the Circuit Court. The reason of the doctrine is fully explained in Shepherd vs. The Orleans Cotton Press, 2 Ann. 110–112.

"We consider it well settled, that the pendency of *this suit for the enforcement of his hypothecary rights did not dispense* the plaintiff with the necessity of re-inscription. See Shepherd vs. Orleans Cotton Press, 2 Ann. 100. McElrath vs. Dupuy, Ib. 520. Hyde vs. Bennett, Ib. 799." Adle vs. Anty, 5 Ann. 634.

See, also, page 633 of same volume.

The above doctrine is reiterated in Hyatt vs. Gallier, 6 Ann. 321.

McElrath vs. Dupuy, 2 Ann. 520.

Hyde vs. Bennett, 2 Ann. 799.

Young vs. City of New Orleans, 9 Ann. 193.

"After the lapse of ten years without re-inscription before that time, subsequent mortgages are not affected by the first inscription and *neither notice nor the pen-*

dency of a suit on the mortgage dispenses with re-inscription."

Watson vs. Bondurant, 30 Ann. 11.

The same bench which decided the Bondurant case, after reviewing the former decisions, said, in Adams vs. Daunis, 29 Ann. 322:

"The jurisprudence of Louisiana seems now to be settled, that there is *no notice or knowledge of a mortgage, by which a third person* can be affected other than that which is afforded by *inscription* in the proper office."

But it was contended in the lower Court, that this Court had settled the law directly contrary to the Courts of Louisiana, and that therefore, the decisions of the Supreme Court of Louisiana should not be followed, and the case of Paterson vs. De LaRonde, 8 Wal. 292, is cited as conclusive. In that case Paterson recognized the mortgages by recitals in the act of purchase *which he signed.* Again, *it seems* the mortgaged property was actually *sold before the mortgage perempted.* Under the settled jurisprudence of Louisiana, the *decision* would seem to be correct, but reasoning of the Court would seem to have been based on a misapprehension of the Louisiana decisions.

A quotation from Judge Garland's opinion (2 Ann. 854), from which *a rehearing was granted* and *another opinion substituted* seems to be made the bases of the decree in 8 Wallace, page 300. Now the Court of which Judge Garland (who left Louisiana in disgrace) was a member, was abolished by the Constitution of 1845, and his opinion, which had been hung up on the rehearing, was given by the reporter to explain the case.

The binding decision of Judge Eustis in 1847, as the organ of the Court in that case, takes care to say nothing confirmatory of Judge Garland's views. See opinion. Robinett vs. Compton, 2 Ann. 866. We have already seen, that Judge Eustis' Court held, in the *same volume*, *diametrically the opposite* of Judge Garland, and that from 1847, five years before the Bondurant sale, the law of Louisiana has been uniform as to the necessity of *reinscription*, to preserve a mortgage pending suit, 2 Ann. 100. Ib. 520; Ib. 787, and Ib. 799.

The case of Swan vs. Moore on the question of *notice of a sale*, as affecting a mortgagee, was decided by a divided Court. The decision gave great dissatisfaction to the profession, and the opinion of the Chief Justice was subsequently followed and declared to be law. 14 Ann 838.

See Hauck vs. Plattsmeyer, 21 Ann. 427.
Isaac Levy vs. Menty, 23 Ann. 261.
Brou vs. Kohn, 12 L. R. 102.
Succession of Falconer, 4 Rob. 5.
Minor vs. Alexander, 6 Rob. 170–171.
Tulane vs. Levistones, 2 Ann. 787.
Succession of Henry Flower, 12 Ann. 216. Kohn, vs. McHatton, 20 Ann. 223.
Batey vs. Woolfolk, 20 Ann. 385.

Delony vs. George, 20 Ann. 216–217.
Britton & Koontz vs. Mormont, 20 Ann. 508.
Succession of Lowrey, 22 Ann. 205.
Taylor vs. Ealer, 22 Ann. 278.
Gegan vs. Bonman, 22 Ann. 337.
Rochereau vs. Dupasseur, 22 Ann. 403.
Byrne vs. Citizens' Bank, 23 Ann. 275.
Blair vs. Taylor, 25 Ann. 148.
Succession of Cordeviolle, 26 Ann. 535.
Sorells vs. Stamper, 27 Ann. 630.
Allet vs. Woods, 24 Ann. 193.
Villavaso vs. Walker, 28 Ann. 775.
State rel. Slocomb & Rogillio, 30 Ann. 834, 837.
Fillastre vs. St Amand, 32 Ann. 352.

If any principle of law is well settled in Louisiana, it is, that so far as third persons are concerned, the inscription and reinscription of mortgages are indispenble. The list of authorities given by no means exhausts the number. And we respectfuly submit, that while these decisions bind *the citizens* of Louisiana, they ought also to bind all persons claiming rights under the laws of Louisiana upon real property within the boundaries of the State.

The objection raised by appellant's counsel, that minority relieves from inscribing and reinscribing mortgages arises from a misapprehension ot art. 3333. Under this article of the Code of 1825, which we have cited in full, the tacit mortgage of the *minor* against his *tutor*, was not required to be inscribed or reinscribed

This exception in favor of the minor against his *tutor* was expressly abolished by the Constitution of 1868, which declared, among other things, that "no mortgage or privilege shall affect third parties, unless recorded in the parish where the property to be affected is situated." Const. La. 1868, art. 123. See, also, Const. La. 1879, art. 176, to same effect. It is not pretended that either of the Watsons was ever tutor to any Bondurant, and we do not perceive how the exception in the Code of art. 3333 can prejudice Frank Watson.

It is needless to say, that the enumeration of the modes of extinguishing mortgages by art. 3411, Code 1825, 3374, is not exclusive of other modes. See Wooley vs. Russ, 24 Ann. 482; Shields vs. Brundidge, 4 L. R. 326.

Appellant's counsel seems to think, that his case might be made stronger, by insisting that the mortgage is merged in the *judgment* against the Bondurants. If such be the case, and it has extinguished the mortgage by merger, or as the civilians say by novation, then the mortgage no longer exists, and the judgment takes its place, and as the *pact de non alienando* has not been declared by the judgment to exist against third persons, and as no right has been reserved, to proceed against them, the judgment can only affect parties to the suit.

St. Romes vs. Blanc, 31 Ann. 48.

We do not see how that view of the case can benefit the appellant. If our adversaries think they can make anything out of the doctrine of merger, we will refer them to the case of Dennistoun vs. Payne, 7 Ann. 334.

The *ex parte* order of the judge in the order of seizure and sale is only a *quasi* judgment and produces no such effect. Herrod vs. Voorhies, Adm., 16 L. R. 254; 2 A. 490–1; 3 A. 253.

In conclusion, we respectfully recapitulate the following points in favor of the appellee and defendant in error. They seem to us conclusive:

1st. There is NO WRIT OF ERROR from this Court to the Supreme Court of Louisiana, and the decree of the Supreme Court of Louisiana in this case is not subject to review at this time.

2nd. The said Mrs. Ella F. Bondurant, in her capacity of executrix and tutrix, DID NOT STATE A CASE as to citizenship in her petition for removal which entitled her to remove the suit for an injunction into the Courts of the United States.

3rd. THE PROOF of citizenship accompanying the same did not overcome *the contrary allegations* of her petition for letters of executorship.

4th. The suit for an injunction WAS NOT REMOVABLE into the Circuit Court of the United States, for the following reasons: Because it was not an original cause; Because the State Court HAD POSSESSION of the property (the *res*); Because the Circuit Courts of the United States are without jurisdiction TO REVISE the decisions of the State Courts original or appellate; and finally, Because the Courts of the United States are expressly prohibited by the Revised Statutes from injoining the process of the State Courts in this class of cases.

5th. THE LANDS of said Frank Watson in his possession as owner WERE NOT SUBJECT TO SEIZURE under a judgment in an ordinary hypothecary action against three other persons, viz.: Horace, John and Albert Bondurant, to which said judgment said Watson had never been made a party.

6th. THE FINAL JUDGMENT of the Supreme Court of Louisiana, pronounced at the instance of Mrs. Bondurant on her appeal, until reversed, IS A BAR to any other suit for the same cause of action between the same parties.

7th. The pretended mortgage has been PEREMTED by the lapse of more than twice ten years with intervals of more than ten years between the first and second inscription and an interval of not only the twelve years pleaded, but now more than fifteen years since the last inscription, and the same has been properly CANCELLED AND ERASED from the registry of mortgages, as shown by the certificate of mortgages, and the record itself.

We therefore respectfully submit, that the judgment of the Supreme Court of Louisiana ought not to be disturbed, and that the case in the Circuit Court ought to be entirely dismissed for want of jurisdiction, or affirmed at the cost of appellant.

All of which is respectfully submitted by

E. T. MERRICK AND
GEO. W. RACE,
For Frank Watson.